1 JURISDICTIONAL STATEMENT

2 BRIEF OF APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

3 MOTION TO DISMISS OR AFFIRM

4 MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

5 APPELLANTS' REPLY BRIEF

6 APPELLANTS' BRIEF

7 PETITION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND
BRIEF AMICUS CURIAE

8 BRIEF FOR THE UNITED STATES

9 BRIEF OF APPELLEE AND RESPONDENT

10 REPLY BRIEF OF APPELLEE AND RESPONDENT

11 BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE
NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS.

12 BRIEF OF AMICUS CURIAE ON BEHALF OF CITY OF KENOSHA
(WISCONSIN)

13 PETITION FOR WRIT OF CERTIORARI AND APPENDIX

14 REPLY BRIEF OF PETITIONERS

15 BRIEF FOR THE UNITED STATES IN OPPOSITION

16 BRIEF FOR RESPONDENT IN OPPOSITION

17 PETITION FOR REHEARING OF APPELLEE

18 PETITION FOR REHEARING

19 REPLY TO PETITIONS FOR REHEARING OF GOVERNMENT
AND APPELLEE

20 REJOINDER OF APPELLEE TO REPLY OF APPELLANTS ON PETITION
FOR REHEARING

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 7

No. 18

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

(For List of Attorneys see inside front cover)

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TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2-4

Statutes, Regulation and Charter.................. 4-5

Questions Presented 5-6

Statement of the Case............................. 6-9

Questions are Substantial......................... 9-16

Appendix A—Judgment and Opinion of Court of Appeals 1a-8a

Appendix B—Statutes, Regulations, and Charter Provisions 9a-16a

AUTHORITIES CITED

Alabama v. King and Boozer, 314 U. S. 1........... 13, 14

Esso Standard Oil v. Evans, 345 U. S. 495.......... 14

Graves v. New York, 306 U. S. 466................ 13, 14

Helvering v. Mountain Producers, 303 U. S. 376.... 14

James v. Dravo Contracting Co., 302 U. S. 134..... 13, 14

Kennedy v. Mason, 334 U. S. 249................... 4

Kern-Limerick and United States of America v. Scurlock, 347 U. S. 110....................... 13

Longest v. Langford, 274 U. S. 499................ 4

M'Culloch v. Maryland, 4 Wheat. 579.............. 14, 15

Murray Corp. v. City of Detroit, 132 F. Supp. 899... 2

Murray Corp. v. City of Detroit, 234 F. 2nd 380.... 2

New Brunswick v. United States, 276 U. S. 547..... 13, 14

Oklahoma Tax Comm. v. Texas, 336 U. S. 342....... 13

Offutt Housing Corp. v. Sarpy County, 351 U. S. 253 13, 15

Roth v. Delano, 338 U. S. 226..................... 3

S. R. A. v. Minnesota, 327 U. S. 558............... 13, 14

United States v. Allegheny County, 322 U. S. 174... 14

Watson v. Employers Liability Assurance Corporation, 348 U. S. 66............................ 3

STATUTES, REGULATIONS, ETC.

Pag

R. S. 3648, 31 U. S. C. A. 529......................

C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (2))........

28 U. S. C. A. 1331, 1332.........................

C. 646, 62 Stat. 961 (28 U. S. C. A. 2101 (c))........

C. 65, 62 Stat. 21 et seq. (41 U. S. C. A. Sec. 151)....

C. 288, Title III, §305, 63 Stat. 396 (41 U. S. C. A. 255) ....

Procurement Regulations 5.407.2 (1), 12 F. R. 7693

Sec. 211.1 C. L. 1948 (7.1 M. S. A.)................

Sec. 1, Ch. IV, Title VI, Charter, City of Detroit.... 5,

Sec. 26, Ch. IV, Title VI, Charter, City of Detroit...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

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No.........................

◆

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees

◆

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

◆

JURISDICTIONAL STATEMENT

◆

(For List of Attorneys see inside front cover)

Defendants and appellants, City of Detroit, a Michigan municipal corporation, and County of Wayne, a Michigan Constitutional Body Corporate, appeal from the judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 16, 1956 affirming separate judgments rendered against them in behalf of plaintiff and appellee, The Murray Corporation of America, in the District Court for the Eastern District of Michigan, for sums totalling Sixty-seven Thousand Seven Hundred Fourteen and 96/100 ($67,714.96) Dollars against appellant City and Twelve Thousand Five Hundred Seventy-two and 66/100 ($12,572.66) Dollars against appellant County. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is involved.

(A) OPINION BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, appears in 234 F. 2nd 380. A copy of the Judgment and Opinion of the Court are attached hereto as Appendix A. The Opinion of Hon. Thomas P. Thornton, District Judge for the Eastern District of Michigan, is reported in 132 F. Supp. 899.

(B) JURISDICTION

(i) These suits were brought and original jurisdiction invoked by plaintiff and appellee, Murray, under 28 United States Code, Sections 1331 and 1332, respectively.

(ii) Two suits for recovery of the first and second half installments of the disputed City personal property tax together with a third action against the County of Wayne were consolidated and all disposed of together by judgment in the United States Court of Appeals, Sixth Circuit, on June 16, 1956 in Cause No. 12678. Notice of Appeal was filed in that Court in each of the three cases on July 25, 1956.[1]

(iii) Jurisdiction of the Supreme Court to review the latter judgment by direct appeal is conferred by C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (2)); C. 646, 62 Stat. 961, as amended by C. 139, §106, 63 Stat. 104 (28 U. S. C. A. 2101 (c)).

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review said judgment on direct appeal in this case:

1. *Watson v. Employers Liability Assurance Corporation*, 348 U. S. 66, 99 L. Ed. 74.

In that appeal from affirmance of a judgment of dismissal of an action brought under the Louisiana direct action statute in the District Court, the Supreme Court's opinion acknowledged right of review there by appeal as appears at p. 70 U. S. (p. 80 L. Ed.):

> "Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal."

2. *Roth v. Delano*, 338 U. S. 226, 94 L. Ed. 13.

Jurisdiction there was taken by this Court to review by appeal the dismissal of a petition brought by the Attorney General of Michigan for right to escheat unclaimed dividends held by a national banking institution under liquidation. As noted in the opinion, at p. 228 U. S. (p. 16 L. Ed.):

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[1] The issues raised being identical, this Jurisdictional Statement is intended to apply to all three cases in conformance with Rule 15 (3).

> "The Court of Appeals held the state statute ineffective as an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions."

3. *Kennedy v. Mason*, 334 U. S. 249, 92 L. Ed. 1347.

In that case as in the one here submitted, the Supreme Court had before it a controversy involving provisions in government war production contracts. Applicable here is the language noted at p. 256 U. S. (p. 1350 L. Ed.) of the opinion:

> "The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately and ultimately affecting by a vast sum the cost of fighting the war."

4. *Longest v. Langford*, 274 U. S. 499, 71 L. Ed. 1170.

There the distinction between review on writs of error or by petition for certiorari was noted at p. 500 U. S. (p. 1171 L. Ed.). The opinion states that the distinction is important and serves a real purpose.

(v) Statutes Involved

(v) Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix B attached hereto.

Armed Services Procurement Act of 1947, Public Law of 80th Congress, C. 65 §2, 62 Stat. 21 *et seq.*, as amended, 41 U. S. C. A. Sec. 151 *et seq.*

R. S. 3648, 31 U. S. C. A. 529;

C. 288, Title III, §305, 63 Stat. 396, as amended, 41 U. S. C. A. Sec. 255;

Procurement Regulations, 12 F. R. 7693;

Sec. 211.1 C. L. Mich. 1948;

Sec. 1, Chapter IV, Title VI, Charter of City of Detroit;

Sec. 26, Chapter IV, Title VI, Charter of City of Detroit.

(C) QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Did United States contract procurement officers have authority under Federal law to provide for transfer of title to the United States of materials in the possession of appellee (an independent sub-contractor under Federal government prime contracts) upon appellee's receipt of partial payment therefor from its prime contractors, thereby causing invalidation of state and local taxing statutes and non-discriminatory ad valorem personal property taxes[2] levied thereunder against appellee upon such materials as repugnant to the implied constitutional immunity of the United States?

2. If inclusion of transfer of title provisions in subcontracts under Federal contracts was authorized by Fed-

---

[2] This case is novel in that the Supreme Court has never passed on the validity of an ad valorem personal property tax against private parties having in their possession personal property, title to which is purported to be in the United States.

eral statutes,—were the undisputed facts and course of conduct between the contracting parties nevertheless inconsistent with claim of absolute title in the government to *materials acquired* for processing by appellee, creating instead paper title for security purposes which would not invalidate state and local statutes or non-discriminatory ad valorem personal property taxes levied thereunder as repugnant to the implied constitutional immunity of the Federal governemnt?

3. If inclusion of such partial payment-title passage provisions was authorized by Federal statutes and vested absolute and not paper or security title to such materials in the Federal government,—then were state and local statutes and non-discriminatory ad valorem taxes levied thereunder (the incidence of which was not against the government and for which appellee alone is liable for paymen and collection) nevertheless valid as imposing no direct burden upon the Federal government in violation of its implied constitutional immunity?

(D) STATEMENT OF THE CASE

The matter here presented involves an appeal of three consolidated causes brought by plaintiff-appellee to recover personal property ad valorem taxes levied by defendants-appellants based on a common assessment as of January 1, 1952 upon personal property in appellee's possession in its plant at Detroit, Michigan, procured and being processed for parts and components of aircraft and aircraft engines to be delivered to Kaiser Manufacturing Company and to Curtiss-Wright Corporation, respectively. The latter were prime contractors with the United States Air Force and were engaged in the manufacture of airplanes for the United States Air Force.[3]

Subsequent to the execution of the respective letter sub-contracts, the prime letter contracts were amended to provide for inclusion of partial payment provisions in appellee's sub-contracts, together with the clause in controversy here that upon the making of any such partial payment, title to all parts, materials, inventories, work in progress and non-durable tools, theretofore or thereafter acquired or produced for the performance of such contract shall forthwith vest in the Government.

Despite right to approve provisions incorporated into these sub-contracts, each separate document contained a disclaimer of obligation on the part of the Government to the sub-contractor.

Pursuant to the Charter of the City of Detroit, Title VI, Chapter IV, Section 1, the assessment in question was made against appellee Murray as the person in possession of the subject property. This is illustrated by Appellants' Ex. 3, consisting of a portion of the City personal property assessment roll. On the line applicable to said property, the Murray Corporation was named as taxpayer and there also appeared the notation "assessed subject to prior rights of Federal Government."

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[3] Appellee's sub-contract with Kaiser consisted of a letter of intent executed March 23, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended Aug. 15, 1951 and again on Oct. 4, 1951, under Kaiser's letter Prime Contract No. AF 33(038)-18481 with the United States Government entered into Dec. 20, 1950 and subsequently amended.

Appellee's other sub-contract with Wright was likewise a letter of intent executed April 19, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended on May 24, 1951, under Wright's Prime Contract No. AF 33(038)-18132 with the United States Government entered into Dec. 12, 1950 and subsequently amended.

The letter prime contract between Wright and the latter referred to a so-called Basic Agreement No. 1 and made it a part of the contract between them. Superseding definitive sub-contracts and prime contracts were not agreed upon nor made effective until after the assessment date here in question.

The agreed upon dollar valuation of personal property so assessed on January 1, 1952 is $2,043,670.00. The claim of appellee against appellant City is in the total sum of $67,714.96 and against appellant County in the sum of $12,572.66 for the tax year 1952, exclusive of interest from the date same was paid under protest prior to commencement of the several actions herein.

The United States petitioned for leave, and was allowed to intervene, claiming ownership of the property on which the assessment was based and an interest in the litigation.

Prior to hearing of appellee's motion for summary judgment depositions were taken at appellants' request, records of appellee Murray were examined and stipulations prepared, executed and filed to the end that the matter could be submitted to the District Judge upon undisputed facts for his determination as a matter of law based upon the pleadings, stipulations, depositions and exhibits.[4]

Judgment for plaintiff-appellee in each of the cases was entered on June 29, 1955, pursuant to an opinion filed by the District Judge.

Following oral argument on appeal taken, judgment of the Court of Appeals, Sixth Circuit, was entered on June 16, 1956 based on its opinion affirming the judgments of the District Court in the three cases. Notice of Appeal was filed in each instance with the Court of Appeals, Sixth Circuit, on July 25, 1956.

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[4] The printed record in the Court of Appeals was in the form of a Joint Appendix.

(E) THE QUESTIONS ARE SUBSTANTIAL

1. Pending Litigation

The issues involved in this case are similar to litigation in other jurisdictions from coast to coast contesting validity of local taxes on the ground that title to the subject personal propery had been transferred to the United States before delivery.

The agreed dollar valuation of Murray Corporation's personal property so assessed on January 1, 1952 was $2,043,670 and judgments against appellant City total $67,714.96 and against appellant County $12,572.66, respectively. In addition, appellee has other similar actions pending in the District Court for 1953 and 1954.

Likewise 3 other Detroit taxpayers represented by appellee's counsel herein have a total of 5 cases pending in said Court and 9 others have a total of 25 cases involving the same or similar legal issues, now pending in the Wayne County Circuit Court against appellant City awaiting ultimate determination of this appeal with perhaps half that number brought against appellant County.

The overall amounts affecting appellants, City and County, total $3,834,524.06[5] for the years 1952 through 1956. New cases are likely to be filed annually so long as contracts continue to be let by the Government with the partial payment-title passage clauses here in question.

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[5] This includes taxes which the City Treasurer receives as collection agent for the Detroit Board of Education.

2. Effect on United States and Local Communities

As important as the large sums presently involved in the many States where these contests are pending is the future effect of construction by the Court of Appeals below of the Armed Services Procurement Act of 1947, upholding provisions in procurement contracts whereby the Government purports to take title directly to material in the course of being manufactured by independent sub-contractors. Equally substantial is the impact of its decision that actual, beneficial title was intended to pass to the Government before delivery of the supplies contracted for by the prime contractor. Such extension of the doctrine of implied constitutional immunity to private independent contractors by the Court below nullifies local tax laws and ignores the protection afforded the government by the careful manner in which the assessment herein was made.

Important public interest, national and local, therefore suggests that this matter should be heard, considered and decided on the merits by this Court.

Reflecting the concern felt by the Government regarding the questions being raised, the following view was expressed in the Brief and Appendix (p. 34) filed in the District Court below by the United States:

> "Also, as the Court knows from statements made at the oral argument, recently the Government has been presented with the same basic problem in other jurisdictions. The number of contracts, as well as the amounts involved, is substantially greater than here. No doubt, some of the same arguments will be advanced. Until an authoritative decision has been rendered by a federal court on which is, essentially, a federal question, the problem remains a fairly critical one to the Government and its procuring agencies."

Similar concern was indicated by appellee Murray Corporation by its opening statement in its main brief filed in the District Court:

> "This case is of national importance."

The District Court in this case pointed out (132 F. (2d) 899, at 900):

> "The Court is not unmindful of the effects of its decision in this matter. The Court has been advised that there are many actions in this geographical area that have been commenced, or are about to be commenced, involving the issue which we are here called upon to resolve, and that the aggregate of taxes involved may well be in the neighborhood of two million dollars."

Representatives of the United States Air Force stated that—

> "partial payment clauses with provisions vesting the title in the United States have been included in upwards of 80% of fixed price prime and subcontracts for the production of aircraft for the United States, by contract, and in substantially a greater percentage of contracts, dollarwise." (Stipulation No. 2, Paragraph (2); Joint Appendix (86)).

The possible nation-wide value of materials in the hands of private contractors doing Federal contract work immunized from personal property taxation by virtue of partial payment-title transfer clauses in such contracts was estimated by the United States Bureau of the Budget as approximately $4,900,000,000 as of June 30, 1953. This appears in report of "Hearings before Sub-Committee on Legislative Program of the Committee on Government Operations," United States Senate—83rd Congress—2nd Session, June 2 and 3, 1954 (pp. 42-53). The resulting tax loss depends, of course, on the assessment percentages and rates in each taxing district and any fluctuation in amount of such materials in the hands of contractors each year on the various local tax dates.

In many States and communities no personal property taxes are assessed, but some form or forms of privilege or specific taxes are usually substituted in their place, which types of taxes have been held valid by this Court when the responsibility for their payment is directly on the contractor and not on the governemnt.

The Commission on Inter-Governmental Relations appointed by the President, upon authority conferred by federal act has recognized the increase in Federal holdings of real and personal property including personalty[6] in the hands of private contractors, claimed immune as in the case herein by virtue of title passing provisions, with its consequent serious effect on local taxation and has noted that the greatest increase has been in urban areas.

Need exists for full as well as final decision whether such non-discriminatory personal property ad valorem taxes may be levied against appellee Murray Corporation on inventory acquired and being processed as a sub-contractor for eventual delivery to prime contractors and by the latter to the United States Air Force under separate prime contracts.

Until this Court ultimately determines the questions of authority for inclusion of said provisions in these subcontracts, together with their proper construction and effect on local tax laws uncertainty continues in the national scene as well as at local levels of government.

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[6] Hearings before the Committee on Government operations, United States Senate, 84th Congress, 1st Session, July 25, 1955, Appendix II (p. 200).

3. Important Issues Left Unanswered by Lower Court

The error of the United States Court of Appeals in invalidating the State statute herein consists chiefly of failure to examine the facts and circumstances of the present case together with the rights and obligations of appellee under its sub-contract as the Supreme Court has done in *New Brunswick v. United States*, 276 U. S. 547; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. New York*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma State Tax Comm. v. Texas Co.*, 336 U. S. 342.

Overlooked by the opinion of the Court of Appeals are certain facts and an admitted course of conduct urged by appellants as grounds for their contention—that the provisions for taking of title were for security purposes only, a mere paper title. (*Offutt Housing Corp. v. Sarpy County*, 351 U. S. 253, 261.) Nor was cognizance taken of appellants' contention that a non-discriminatory personal property tax against an independent contractor "assessed subject to prior rights of the Federal Government" and collectible as a debt against such contractor is valid in that no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government. Passed over also was the mode of assessment followed here within the rule laid down by this Court in such cases as *S. R .A. v. Minnesota*, 327 U. S. 558 and *New Brunswick v. United States*, 276 U. S. 547, 556.

Neither did said Court consider the effect of the finality of State Court decisions on whether responsibility for payment of the taxes in question fell solely on appellee and not the Government. *Alabama v. King & Boozer, supra; Kern-Limerick v. Scurlock*, 347 U. S. 110, 121.

4. Reappraisal Urged of Constitutional Immunity Doctrine

The mere finding that this is an ad valorem property tax on personal property of the government in the hands of a private party is not just cause for nullifying it, as the Court below did on the authority of *United States v. Allegheny County*, 322 U. S. 174.

We urge upon the Court the desirability—perhaps the necessity—of now reappraising its decision in *Allegheny supra*, if it may not be distinguished—with such help as counsel herein are able to provide in briefs on the merits and in oral argument, to determine whether it is in conflict with and unsustainable under the theory of "incidence" or "direct burden" of a tax under the constitutional immunity doctrine as firmly established by such decisions as: *James v. Dravo*, 302 U. S. 134, 114 A. L. R. 318; *Helvering v. Mountain Producers*, 303 U. S. 376; *Graves v. New York*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; *New Brunswick v. United States, supra;* and *S. R. A. v. Minnesota, supra*, and others.

Under the facts and circumstances presented by this appeal these decisions of this Court wherein the true principle of "incidence of the tax" has been enunciated are, we maintain, pertinent.

We respectfully suggest that the entire subject of constitutional immunity can be clarified and rendered possible for future consistent use by this and inferior courts by proper application of the rule laid down by Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheat. 579 at p. 609, to any and all types of taxes (ad valorem as well as specific) namely:

If the tax "*retards, impedes, burdens, or in any manner controls the operations of * * * the powers vested * * * in the general government*" then it is bad. If not it is good.

In this spirit it was suggested to the Supreme Court in the *Dravo* case, *supra*, that it restrict the rule of tax exemption so that a private person who sells to or contracts with the Government cannot claim the immunity against taxation which properly belongs to the sovereign alone. (See *Amicus Curiae*—Brief of Solicitor General and Attorney General, pp. 2-3, *James v. Dravo, supra*). It is our contention that to uphold such restriction here would fit within Chief Justice Marshall's rule or theory of the doctrine of implied constitutional immunity and logically validate the tax laws and taxes here involved.[7]

The fact that this Court has been divided in its opinions in most governmental immunity cases from *Dravo, supra*, to the most recent case of *Offutt Housing Corp. v. Sarpy County*, 351 U. S. 253, is eloquent testimony to the need for reestablishment of a sound and universally applicable interpretation of the immunity doctrine which will clarify the matter both for the Government, the contractors concerned and local taxing bodies.

It is our contention, which we would like to develop more fully in briefs and argument at the earliest opportunity convenient to the Court, that these non-discriminatory taxes here involved, assessed against a private corporation for the payment of which such corporation is solely responsible, and which place no burden upon the government, except such as the government may have assumed by its contracts with the taxpayer (appellee), are and should be equally as valid as the taxes involved in *Dravo, King-Boozer, New Brunswick, S. R. A. etc., supra.* We believe accordingly that the Federal questions presented by this appeal are substantial, that they are of great public importance and should be considered by this Court on briefs and with oral argument on their merits.

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[7] Chief Justice Marshall was attempting to resolve a conflict between the Federal government and a State, involving the whole philosophy of State v. Federal power. Before him was the studied and deliberate attempt by a State to destroy a Federal instrumentality by the levy of a discriminatory "political" tax leveled exclusively at the branch of the United States bank established in Maryland. (Argument of Pinckney in *McCullough*, 4 Wheat. p. 598.)

It is noteworthy that the Chief Justice was careful to except from the effect of his opinion in McCullough non-discriminatory taxes (property taxes included) 4 Wheat. 609. We contend and would like the opportunity to present our views that a true interpretation of that opinion with such exception must logically, legally and equitably lead to the inevitable conclusion that the tax laws and taxes now before this Court should be validated.

Respectfully submitted,

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ALBERT E. CHAMPNEY,
Of Counsel.

September 6, 1956.

APPENDIX A

JUDGMENT AND OPINION OF COURT OF APPEALS

◆

CAUSE ARGUED AND SUBMITTED

June 4, 1956

(Before Allen and Martin, Circuit Judges, and Starr, District Judge.)

This cause is argued by Thomas J. Foley for County of Wayne, by Julius Pliskow for The City of Detroit, appellants; by Victor Klein for The Murray Corporation, and Lyle M. Turner for The United States, appellees, and is submitted to the court.

JUDGMENT

Entered June 16, 1956.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the several judgments of the said District Court in this cause be and the same are hereby affirmed.

OPINION

(Filed June 16, 1956)

Decided June 16, 1956.

Before Allen and Martin, Circuit Judges, and Starr, District Judge.

Martin, Circuit Judge. In three separate actions consolidated on this appeal, brought by The Murray Corporation of America in which the United States of America intervened, the District Court awarded summary judgments in favor of the plaintiff in the total amount of $76,748.47 against the City of Detroit covering personal property taxes illegally collected in two installments for the year 1952 and for $14,116.30 against the County of Wayne, Michigan, for personal property tax illegally collected.

The intervention of the United States was permitted for the reason that the Government claimed ownership of the personal property upon which the tax assessments were made by the City and the County respectively. Concededly, no genuine issue on any material fact was presented, and therefore summary judgment was the proper proceeding for disposition of the issues of law involved.

The assessment of more than $2,000,000.00 in controversy was made against The Murray Corporation of America on personal property in its possession under two letter sub-contracts respectively with "Kaiser" Corporation and "Wright" Corporation, each under and pursuant to letter prime contracts between the United States Government and Kaiser and Wright corporations respectively. These letter sub-contracts covered the manufacture of specified parts and assemblies required under the prime contracts for the United States Air Force for the national defense. These sub-contracts and amendments thereto were approved by a contracting officer of the United States Air Force in accordance with the requirements of the prime contract.

Included in these letter sub-contracts, by amendment, was a partial payment clause which, as stated by the District Judge, presents the nub of the present controversy. This clause in substance provided that upon the making of any partial payment, title to all parts, materials, inventories, work in process, and non-durable tools theretofore acquired or produced by the contractor for the performance of the contract and properly chargeable to the contract under sound accounting practices should *forthwith vest in the Government;* and title to all like property thereafter acquired or produced by the contractor for performance of the contract and properly chargeable as aforementioned should vest in the Government forthwith upon such acquisition or production.

The assessment date under Michigan law with which we are concerned was January 1, 1952. During 1951, the Murray Corporation upon its several requests, audited and approved by a contracting officer of the United States Air Force, received partial payments from Kaiser of more than $163,000.00 and from Curtiss-Wright (successor to Wright Aeronautical Corporation) of more than $510,000.00.

In his clear-cut opinion, District Judge Thornton analyzed the respective positions of the contending parties. The important points made by Murray were that the taxes assessed were ad valorem taxes upon property and not privilege taxes assessed against the taxpayer; that property owned by the federal Government is immune from local ad valorem property taxes; that a federal question is presented for determination under federal and not under state law; that the partial payment clauses vesting title in the federal Government were fully authorized and effective; that under the partial payment clauses title to the property in question was vested in the United States on the assessment date, and that this is an *absolute* and not a bare lien or security title; that Murray is the real party in interest and so entitled to bring the actions; and that the equitable arguments advanced by the City and County have been entirely rejected by the Supreme Court of the United States.

The United States took substantially the same position and contends that the assessment was upon its property and therefore invalid under the federal Constitution.

The position of the City of Detroit was in effect that the partial payment and transfer of title clause was not authorized nor in conformity with federal statutes; that the inclusion of the clause would not defeat an ad valorem tax on personal property in the hands of an independent sub-contractor acquired in the course of carrying out the provisions of a sub-contract for defense production; and that the course of action and dealing with the property was inconsistent with the vesting of absolute title in the United States and the Government therefore acquired merely a lien or title for security purposes leaving Murray vested with an equitable title to the personal property subject to an ad valorem property tax.

The County of Wayne took the same position assumed by the City of Detroit with the added contention, which is clearly not meritorious, that the Murray Corporation is not the real party in interest.

We agree with the finding of the District Court that the partial payment clauses are not invalid for want of authority or for non-conformity with the federal statutes. We concur also in the conclusion of the trial court that "a reading of the Partial Payment Clause leaves no doubt that, upon the making of a partial payment, title to parts, materials, etc., acquired for the performance of the contract vests in the United States Government as does title to all property subsequently acquired for the performance of the contract."

Among the numerous decisions of the Supreme Court of the United States upon the question of the immunity of Government property from state taxation we think *United States v. County of Allegheny,* 322 U. S. 174, is controlling authority in the instant case. In our judgment, the facts of that case are not in any material aspect distinguishable from the facts encountered here. In the *Allegheny* case, the United States made a contract with a machine company in Pennsylvania for the manufacture of large field guns. The private corporation's plant though used for the manufacture of heavy machinery was not equipped for the manufacture of ordnance. It was agreed that certain additional machinery required for the work should be furnished at Government expense and should remain property of the United States. In performance of the agreement the contractor manufactured one machine, the Government furnished eight gunboring lathes and the rest of the needed equipment was purchased by the contractor from other machine tool manufacturers. The machinery bought or built by the manufacturer was inspected and accepted on behalf of the United States which compensated the contractor therefor. The contract provided that the title to all such property should vest in the Government upon delivery at the site of work and upon inspection and acceptance. The Government leased the equipment to the contractor during the period for which the guns were manufactured. The machinery was bolted on concrete foundations in the contractor's plant on real estate owned by it and could be removed without damage to the building. The Supreme Court of Pennsylvania upheld the assessment by Allegheny County upon the ground that under the state law regardless of who held title to it, the machinery constituted a part of the contractor's mill for purposes of assessment and had been properly assessed as real estate. Both the contractor and the United States, which had intervened in the state litigation, appealed to the Supreme Court of the United States. That highest tribunal held that the substance of the procedure by the state assessors was to lay an ad valorem general property tax on property owned by the United States and that the Government-owned property, to the full extent of its interests therein, is immune from taxation, either as against the Government itself or as against one holding the property as bailee. The judgment of the state supreme court was reversed as violative of the federal Constitution.

Upon analysis, we think that substantially all of the arguments advanced by appellant were rejected by the Supreme Court in the *Allegheny* case. The Supreme Court declared that the principle is unshaken, indeed rarely questioned, that "possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." 322 U. S. 177.

In the earlier case of *United States v. Ansonia Brass & Copper Company*, 218 U. S. 452, the Supreme Court had held that vessels in course of construction for the United States, the title to which under the contract vests in the Government as fast as constructed, become instrumentalities of the Government and for reasons of public policy cannot be seized under state laws to answer private claims. In the later case of *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, the Supreme Court distinguished

Alabama v. King & Boozer, 314 U. S. 1, upon the ground that under the contract involved in the *Kern-Limerick* case the United States was the real purchaser. The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department which provided that in procuring needed articles, the contractor should act as purchasing agent for the Government, title to the articles purchased should pass directly from the vendor to the Government and the Government should be directly responsible to the vendor for payment of the purchase price.

We think that reliance of the City of Detroit upon the following cited authorities is not well placed: *Esso Standard Oil Co. v. Evans,* 345 U. S. 495; *James v. Dravo Contracting Co.,* 302 U. S. 134; *Graves v. New York,* 306 U. S. 466; and *Helvering v. Mountain Producers Corporation,* 303 U. S. 376. All of these cases involve excise or privilege taxes, where a privilege exercised by the contractor was taxed to him although the economic burden was passed along by him to the Government. The incidence of the privilege taxes was upon the contractor while in the case at bar an ad valorem property tax had been assessed upon property the title to which is vested in the United States and the incidence of the tax is directly and solely upon the property assessed.

In the *Esso Standard Oil Company* case the Government had *agreed* to assume liability of all estate taxes in connection with a storage contract made by it with a private corporation. The *Allegheny County* case was thus distinguished: "*Allegheny County,* however, was quite different. The United States had leased certain machinery to the Mesta Machine Company. In imposing the state ad valorem property tax, Pennsylvania included in the Mesta assessment both the privately owned land and buildings, and the government machinery. . . . So the value of the federal property was, in part, the measure of the tax. We held the substance of this procedure was 'to lay an ad valorem general property tax on property owned by the United States.' . . . and therefore invalid. Our holding was not 'dependent upon the ultimate resting place of the economic burden of the tax.' . . .

"This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not 'on' the federal property as was Pennsylvania's." 345 U. S. 499.

In our judgment *S. R. A., Inc. v. Minnesota,* 327 U. S. 558, is not apposite for the reason that in that case the contract involved transferred the equity in the land to the purchaser, leaving in the United States only a legal title as security, rendering it the equivalent of a mortgage. The opinion pointed out that no state has power to tax property of the United States against its will; and stated that "under an implied constitutional immunity, its property and operations must be exempt from state control in tax as in other matters." *M'Culloch v. Maryland,* 4 Wheaton 316, 425; *VanBrocklin v. Tennessee,* 117 U. S. 151, 177; and *United States v. Allegheny County,* 322 U. S. 174, 176-177; were cited.

The several judgments of the District Court from which the appeals were taken in the instant controversy are affirmed.

APPENDIX B

STATUTES, REGULATIONS, CHARTER PROVISIONS

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.

§151. PURCHASES and contracts for supplies and services—(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

* * * * *

(10) for supplies or services for which it is impracticable to secure competition;

* * * * *

§153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151(c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(c) All contracts negotiated without advertising pursuant to an authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Feb. 19, 1948, c. 65, §4, 62 Stat. 23; Oct 31, 1951, c. 652, 65 Stat. 700.

§154.

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: PROVIDED, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree. Feb. 19, 1948, c. 65, §5, 62 Stat. 24.

31 U. S. C. A. 529; R. S. §3648; Aug. 2, 1946, c. 744, 60 Stat. 809

§529. ADVANCES OF PUBLIC MONEYS; PROHIBITION AGAINST

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

41 U. S. C. A. 255. (June 30, 1949, c. 288, Title III, §305, 63 Stat. 396)

§255. ADVANCE PAYMENTS ON NEGOTIATED CONTRACTS; GOVERNING TERMS

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

(APR 5—407.2(1))

"Partial Payments—Partial payments, which are hereby defined as payments prior to acceptance on work in progress for the Government under this contract, may be made upon the following terms and conditions.

"(a) The Contracting Officer may, from time to time authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the Property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract exceed 80 percent of the total amount authorized to be expended under paragraph 5 of this Letter Contract.

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder, or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts, and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Clause shall vest in the Contractor.

"(e) The provisions of this contract referring to 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Clause. The provisions of this Clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

"(f) If this contract (as heretofore or hereafter supplemented or amended) contains provisions for Advance Payments and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments clause any unliquidated balance of advance payments is outstanding, then notwithstanding any other provisions of the Advance Payments Clause of this contract the net amount, after appropriate deduction for liquidation of the advance payment of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Clause, and shall thereafter be withdrawn only pursuant to such provisions."

Compiled Laws of Michigan 1948, 211.1 (7.1 MSA)

"Property subject to taxation. Section 1. *The People of the State of Michigan enact,* That all property, real and Personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Section 1, Chapter IV, Title VI, Charter of the City of Detroit, 1918 (1592 Ed.)

"* * * The owners or persons in possession of any personal property shall pay all taxes assessed thereon."

Section 26, Chapter IV, Title VI, City Charter, 1918 (1952 Ed.)

"On and after the 26th day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other than real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining thereafter shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid and no transfer of the personal property assessed shall operate to divest or destroy such lien."

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No.

18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 195~~6~~7

No. [illegible] 18

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

(For List of Attorneys see inside front cover)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 401

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

I.

REVIEW BY APPEAL APPROPRIATE

For reply to position taken by appellee (Murray Corporation) opposing review by this Court pursuant to Sec. 1254(2) of Title 28, U. S. C., attention is called to allegations in complaint filed by it in the United States District Court below.

Paragraph seven claims the assessment is made upon or with respect to property constitutionally immune. Paragraph eight claims Michigan laws and local ordinances purporting to authorize such assessment are repugnant to the Constitution of the United States. Paragraph nine claims such laws and ordinances have been applied in a manner which renders them invalid under the Constitution of the United States. (Joint Appendix, p. 6)*

Such allegations provide the framework on which all the issues discussed in the briefs and opinions in this case depend. Even though no specific reference is made to them in the Court of Appeals' opinion, there is passing mention that the United States claimed that the assessment was upon its property and was therefore invalid under the Federal Constitution.

However, affirmance of the judgments in the District Court below in holding these assessments invalid would have the identical legal effect as the final decision in *Kern-Limerick, Inc. v. Scurlock,* 347 U. S. 110. We quote from opinion of the Court of Appeals sought to be reviewed herein (at pp. 6a and 7a, Jurisdictional Statement) 234 F. 2nd 380, 383, where the decision in Kern-Limerick was characterized as follows:

---

*The Murray Complaint was adopted by the United States (Joint Appendix, p. 76).

> "The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department * * *."

By analogy application of the above language to the facts at hand produces the following inevitable result:

The Michigan *ad valorem* property tax law and local ordinances were held unconstitutional as applied to transactions where private contractors were in possession of personal property on hand for processing to be incorporated into aircraft being manufactured for the United States under a cost-plus-fixed-fee prime contract containing partial-payment, title passage clauses on which partial payments had been made prior to effective tax date.

We believe the Courts below thus held Michigan Statutes and local ordinances, as applied to the facts before them, unlawfully interfered with the Federal Constitution. The problem is one of alleged clash between state and federal laws. This is sufficient for appellate jurisdiction of this Court under Sec. 1254(2) 28 U. S. C.

Unlawful interference is a holding of invalidity because of repugnancy. Any other view would permit a Court of Appeals to deprive this Court of appellate jurisdiction, when in fact holding a state statute invalid because of repugnancy to a federal law—merely by phrasing the opinion in such a way as not to use the exact words of Sec. 1254(2).

> "A statute may be invalid as applied to one state of facts, and yet valid as applied to another."
>
> *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289.

This Court acknowledged jurisdiction by appeal in *Watson v. Employer's Liability Assurance Corporation,* 348 U. S. 66, stating at pp. 69-70:

> "With emphasis on the due process contention, the District Court dismissed the case, holding both statutory provisions unconstitutional as to policies written and delivered outside the State of Louisiana, 107 F. Supp. 494. The Court of Appeals agreed with the District Court and affirmed the dismissal, 202 F. 2nd 407. Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal."

Further this Court took jurisdiction where the Court of Appeals held a state statute ineffective, *Roth v. Delano,* 338 U. S. 226, 228, and has accepted for review without commenting thereon similar determinations striking down official acts taken pursuant to State laws as repugnant to the Federal Constitution or laws (*New York v. Latrobe,* 279 U. S. 421; *Madden v. Kentucky,* 309 U. S. 83 and *Ott v. Miss. Valley Barge Line Co.,* 336 U. S. 169).

II.

QUESTIONS ARE SUBSTANTIAL

Appellees apparently seek to bar the opportunity sought by appellants City and County for final, authoritative determination of the important questions of intergovernmental immunity presented by this appeal. If upheld, appellees' view would still leave the United States in an uncertain position with regard to its own powers in view of other pending litigation in Michigan and elsewhere. There is still need for full and final decision as indicated by this excerpt from the closing paragraph of Brief filed by the United States in the Court of Appeals (p. 24):

> "This Court is no doubt aware of the importance to the Government of questions such as the validity of its commonly used procurement procedures, the standing of strangers who challenge these procedures, and the immunity of its property from local taxation. This case has, therefore, a significance beyond its monetary aspects. Until an authoritative decision is rendered on such essentially federal questions, the entire process of procurement under the statutes herein discussed will be open to attack, since it cannot be predicted what type of clause or contract will be the next subject of litigation."

Finally, it appears that arguments and authorities in appellee Murray's Motion to Affirm touch on the first and second of the questions raised in this appeal but not the third (Jurisdictional Statement 5, 6). The latter issue was submitted as Question No. 4 in the appellant City's Brief in the Court of Appeals. That Court's opinion did not list it as an issue and summarily disposed of it in a very general manner.

If we assume—for purposes of determining whether anything remains for this Court to review—that said appellee is correct in its position with regard to the first two questions, nevertheless need plainly exists at this time for reexamination and full consideration of judicial landmarks dealing with incidence, direct burden and their effect on constitutional immunity (Jurisdictional Statement 14, 15) to the end that a clear and universally applicable interpretation of *McCullough v. Maryland* can be presented for future guidance of officials at all levels of government.

However, appellants believe that full consideration and argument are urgently needed and should be permitted on all of the important federal issues raised by their appeal.

With respect to motion of the United States to Dismiss or Affirm, appellants submit all its objections have been fully answered above and particularly at p. 4 by reference to the quotation from the close of Government's Brief in the Court of Appeals and by the Jurisdictional Statement (13-16) heretofore filed.

The position of counsel for the Government moreover is diametrically opposed to grounds in its Jurisdictional Statement just received in Appeal No. 487 entitled *United States and Borg-Warner Corporation v. City of Detroit* in which right of review is claimed under Sec. 1257(2) from determination of Michigan Supreme Court holding a state statute valid where a tax was imposed on lessee of real property owned by the United States.

Arguing that the questions are substantial, counsel for Government there urged at p. 8 of its Jurisdictional Statement:

> "This appeal presents important constitutional questions involving the immunity of the United States from taxation of its property by the States. The decision of the Supreme Court of Michigan upholding the validity of a local tax which is imposed on a lessee of property belonging to the United States and which is measured by the full value of the property, carries obvious and far-reaching implications. While the precise point in issue has not been, but ought to be, settled by this Court, we believe that fundamental principles regarding the sovereign immunity of the United States, which have received repeated application in the decisions of this Court, compel the conclusion that the tax in question is constitutionally invalid."

Invalidation of this personal property tax by the Court of Appeals ~~likewise~~ presents federal questions which have not been but ought to be settled by this Court and much farther reaching implications than the validation of the tax involved in Appeal 487.

RELIEF

Wherefore, appellants submit that jurisdiction should be noted by the Court and said motions by appellees to dismiss or affirm be denied; or in the alternative, if such appeal is deemed inappropriate that same be considered and allowed as a petition for certiorari herein.

Respectfully submitted,

CITY OF DETROIT, a Michigan municipal corporation, Appellant,

By PAUL T. DWYER,
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VANCE G. INGALLS,
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and

COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Appellant,
By GERALD K. O'BRIEN,
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Assistants Prosecuting Attorney,
and

ALBERT E. CHAMPNEY,
Of Counsel.

October 11, 1956.

3

No

18

THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 407

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,

v.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Motion to Dismiss or Affirm

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TABLE OF CONTENTS

	Page
Motion to Dismiss or Affirm	1
Statement of the Case	2-5

Argument

	Page
I. No Question is Presented Which Gives this Court Jurisdiction of the Appeal	5-7
II. No Substantial Federal Question is Presented by the Appeal	7
Conclusion	13

AUTHORITIES CITED

Decisions

Page

Atkin v. Kansas, 191 U.S. 207 (1903) 9

City of Detroit v. Phillip, 313 Mich. 211 4

Craig, State Tax Collector v. Ingalls Ship Building Corp., 192 Miss. 254 (1942) 11

Douglas Aircraft Co. v. Byram County Tax Collector, 57 Cal. P. App. (2d) 311 (1943) 11

Ellis v. United States, 206 U.S. 246 (1907) 9

Esso Standard Oil Co. v. Evans, 345 U.S. 495 at 499 (1953) 4

Heim v. McCall, 239 U.S. 175 (1915) 9

Kennedy v. Silas Mason Co., 334 U.S. 249, 256 (1948) 11

Kern-Limerick, Inc. and United States v. Scurlock, Commr. Rev. of Arkansas, 347 U.S. 110, 116, 117, 121, 123 and footnote 14 (1954) 4, 7, 9, 12

Muschany v. United States, 324 U.S. 49, 63 (1945) 9

Neilson v. Lagow, 12 How. 98 (1851) 9

Pingree v. Auditor General, 120 Mich. 95, 102, 109 4

Read York, In re., 152 F (2d) 313, 316 (1945) 10

Superior Shipbuilding Co. v. Beckley, 175 Wis. 337 (1921) 11

Taylor v. County of Genesee, 286 Mich. 674, 677-78 (1938) 4

United States v. Allegheny County, 322 U.S. 174, 182, 187-88 (1944) 4, 7, 11

United States v. Ansonia Brass & Copper Co., 218 U.S. 452, 466-72 (1910) 10, 11

Page

United States v. Hodson, 10 Wall 395 (1870) 9

United States v. Linn, 15 Pet. 290, 315-16 (1841) ... 9

United States v. Tingey, 5 Pet. 115, 127 (1831) 9

Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886) 4, 9

Wright Aeronautical Corp. v. Glander, 151 Ohio 29, (1949) 11

STATUTES AND LEGISLATIVE HISTORY

Armed Services Procurement Act of 1947—
(41 U.S.C.A. Sec. 151 (c))

62 Stat. 23(a) 8

28 U.S.C., Section 1254(2) 1, 5, 7

Michigan General Property Tax Law—6 Mich. Stat. Anno. Sec. 7-1—7.243 .... 3, 4

REGULATIONS

32 Code of Federal Regulations, 1949 Ed (1950 Pocket Supp.)

Sec. 402-501, Chapter IV, Sub-part E.....Appendix

10 Code of Federal Regulations, 1947 Supp. Chap. VIII, Par. 805, 407-2 (12 Fed. Register 7693) (A.S.P.R. 5-407-2 (1)) 8

OPINIONS, ADMINISTRATIVE RULINGS AND OTHER REFERENCES

20 Opinions of Attorney General (U.S.) 746, 747 (1894) 10

29 Opinions of Attorney General (U.S.) 46, 48.... 10

Page

4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949)—Comptrolier General Dec. No. B-83260 10

4 Contract Cases Fed. (C.C.H.) Sec. 60,016—Opinion of Judge Advocate General, SPJGC (1945) 101118 10

Opinions of Attorney General—Michigan
  January 17, 1936 4
  May 28, 1941 4

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1956

No. 401

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,

v.

THE MURRAY CORPORATION OF AMERICA
a Delaware Corporation, and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Motion to Dismiss or Affirm

Appellee, The Murray Corporation of America, pursuant to Rule 16(1)(a) of the Revised Rules of the Supreme Court of the United States, moves that

> (1) the appeal herein be dismissed on the ground that said appeal is not within the jurisdiction of the Court because not taken in conformity to 28 U.S.C., Section 1254(2),

or, in the alternative,

> (2) the final judgment and decree of the Court of Appeals be affirmed, pursuant to Rule 16(1)(c), on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

STATEMENT OF THE CASE

This is a consolidated action originally brought by plaintiff-appellee, The Murray Corporation of America (hereinafter referred to as "Murray"), for a refund of personal property **ad valorem** taxes assessed by defendants-appellants, City of Detroit and County of Wayne as of January 1, 1952 upon personal property of the United States then in the possession of Murray under two letter subcontracts, under letter prime contracts between Kaiser Manufacturing Company and the United States and Curtiss-Wright Corporation and the United States, respectively, for the manufacture of parts and components for aircraft and aircraft engines for the United States Air Force for defense purposes.

Title to such personal property was vested in the United States on and prior to the assessment date by virtue of provisions of partial payment-title vesting clauses, incorporated in the letter subcontracts, which provided expressly that upon receipt by Murray of

> "partial payments . . . prior to delivery, on work in progress for the Government under this contract . . .
>
> (b) Upon the making of any partial payment under this contract, **title** to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, **shall forthwith vest in** the Government; and **title** to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid **shall vest in the Government forthwith** upon said acquisition or production . . ."[1].

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[1] This is a standard and widely used partial payment clause contained in procurement contracts for defense work for the United States Government, which clause is permitted by Federal law and is provided for under applicable procurement regulations.

Partial payments were made to Murray under each of the aforementioned letter subcontracts prior to January 1, 1952, the assessment date, and thereupon title vested in the United States and remained vested in the United States on and after such date. Throughout, Murray contended that the property was owned by the United States and was immune from local ad valorem taxation and that the assessment and taxation of such property to Murray was illegal and void. After exhausting all administrative review Murray paid the taxes in question involuntarily and under written protest.

The cause was submitted to the District Court upon plaintiff-appellee's Motion for Summary Judgment and at the hearing of March 11, 1954—

> "it was **agreed** among the parties that **there was no genuine issue of any material fact,** and that a summary **judgment in favor of the plaintiff, or in favor of the defendants would be in order."**

See opinion of District Court, 132 Fed. Supp. 899, 900.

The tax here in question is an **ad valorem property tax** assessed pursuant to the Michigan General Property Tax Law and the Charter of the City of Detroit.

The City of Detroit personal property taxes here involved were assessed pursuant to Title VI, Chapter II, Section 1 of the Charter of the City of Detroit which provides:

> "Section 1 **All** real and **personal property** within the city **subject to taxation by the laws of this state shall be assessed** at its true cash value by the board of assessors herein provided . . . **All taxes upon personal property** may be assessed in any district, whether the person assessed is a resident of such district or not."

Both the City of Detroit and County of Wayne personal property tax assessments are made subject to the authority of the General Property Tax Act of Michigan, 206 of the Public Acts of Mich. 1893, as amended (6 Mich. Stat. Anno. Sec. 7.1-7.243).

The tax is levied and assessed upon **property,** though collection may be enforced against the owner or, under certain circumstances, the person in possession. The tax is not a specific or privilege tax assessed against the taxpayer. *City of Detroit v. Phillip,* 313 Mich. 211; *Pingree v. Auditor General,* 120 Mich. 95, 102, 109.

If the title to and ownership of the property assessed was vested in the United States, the assessment is clearly void because such property owned by the United States is immune from taxation, even though in the possession of Murray. *United States v. Allegheny County,* 322 U.S. 174 (1944), *Van Brocklin v. Tennessee,* 117 U.S. 151 (1886); see *Kern-Limerick, Inc. and United States v. Arkansas.* 347 U.S. 110, 123, and footnote 14; compare *Esso Standard Oil Co. v. Evans,* 345 U.S. 495 at 499 (1953). This is also recognized by Michigan authorities. *Taylor v. County of Genesee,* 286 Mich. 674, 677-78 (1938); *Opinions of Michigan Attorney General,* January 17, 1936 and May 28, 1941.

On the other hand, if the partial payments clause was invalid under Federal law or if the title under the partial payments clause was only a bare lien or security title—as appellants contend—and ownership in fact remained in Murray on the tax assessment date, then under both Michigan and Federal law the property was not immune from taxation and the assessment was valid. That is the basic issue presented by this case.

The District Court and the Court of Appeals concluded as a matter of law that the partial payments clauses were authorized and valid under Federal law and that absolute title and ownership to the property in question was vested in the United States on tax assessment day.

I.

No Question is Presented Which Gives this Court Jurisdiction of the Appeal

Appellants predicate jurisdiction of this appeal upon Section 1254(2) of Title 28, U.S.C., which provides that this Court may review a judgment of the Court of Appeals

> "By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . "

The Court of Appeals did not decide that the Michigan General Property Tax Law or the Charter of the City of Detroit, pursuant to which the taxes in question were assessed, were "invalid as repugnant to the Constitution, treaties or laws of the United States," but held that under the partial payments clause in question the United States was vested with absolute title to the property in question and accordingly Murray had no interest in the property which could be subject to taxation. The validity of the ad valorem tax laws of the State of Michigan and of the City of Detroit have never been questioned in this litigation. The only real question has been whether title was vested in the United States or in Murray.

Appellants have never contended that property of the United States may be subjected to state ad valorem property taxes and the Michigan statute has never been construed as permitting the taxation of Federally owned property. Indeed, in his argument before the District Court counsel for the City of Detroit stated:

> "And I might say that it is not the position of the City that it has the right to tax the property of the United States Government. But we contend that we did not do that in this case."[2]

In their joint Reply Brief in the Court of Appeals appellants further stated that—

> "Neither the County nor the City has contended that these levies were specific taxes or that they were not **ad valorem** property taxes."

The District Court noted that—

> "There is no disagreement on the proposition that local government may not tax property owned by the Federal Government. Whether the personal property here assessed was owned by the Federal Government in the sense that it could not be taxed at a local level is the issue." 132 F. Supp. 899,904.

Appellants' statement (pages 5 and 6 of Jurisdictional Statement) that by determining that title to the personal property in question was vested in the Government the Court of Appeals caused "invalidation of state and local taxing statutes . . . repugnant to the implied constitutional immunity of the United States," is a non sequitur. Admittedly the state and local taxing statutes imposing an ad valorem tax on property are valid. If title to the property was vested in the United State on tax assessment day, the property was constitutionally immune from such taxation. If title was not vested in the United States, there was no immunity.

The Court of Appeals merely applied Federal law to determine whether title to property produced for the sole ownership and use of the United States, in connection with the national defense, was in fact vested in the United States.

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[2] Transcript of proceedings before Honorable Thomas P. Thornton, District Judge, March 11, 1954; page 76.

United States v. Allegheny County 322 U.S. 174, 182; (1944, *Kern-Limerick Inc. v. Scurlock,* 347 U.S. 110, 121 (1954). Having so determined, the doctrine of Federal constitutional immunity undisputably obtains.

The authorities cited by appellants in support of this appeal (pages 3-4 of Jurisdictional Statement) merely reaffirm the rule that an appeal will lie only where a state statute is held invalid as repugnant to the Federal Constitution and do not support appellants' position here.

No question of the invalidity of a state statute as being repugnant to the Constitution, laws or treaties of the United States is here presented. We respectfully submit that this Court does not have jurisdiction of the appeal under 28 U.S.C. Section 1254 (2) and that the appeal should be dismissed.

II.

No Substantial Federal Question is Presented by the Appeal

Even if appeal under 28 U.S.C. Section 1254 (2) lies, we submit that the judgment of the Court of Appeals should be affirmed without further argument or filing of briefs because the questions have been authoritatively decided by this Court. The decision of the Court of Appeals is clearly correct and in complete accord with such prior decisions of this Court and every other court which has decided the question presented by this cause. There is no conflict of decision presented and no federal question which has not previously been decided by this Court or a Federal Court of Appeals.

The Partial Payment Clauses Vesting Title in the Federal Government Included in the Murray Subcontracts were Authorized, Effective and Valid.

Appellants' contention that the Air Force procurement officers lacked authority to provide for the inclusion of partial payment clauses in the subcontracts here involved, transferring title to aircraft parts and components—manufactured by Murray for the United States—to the United States upon Murray's receipt of a partial payment upon the purchase price is contrary to express statutory provision and the decisions of the Court.

The subcontracts here involved and the prime contracts under which they were entered into were negotiated pursuant to authority contained in the Armed Services Procurement Act of 1947, 62 Stat. 23(a), (41 U.S.C. Section 151(c)) and regulations promulgated pursuant thereto. Congress expressly provided in Section 4(a) of this act that—

> "Except as provided in subsection (b)[3] of this section, contracts negotiated pursuant to Section 151(c) of this title may be of **any type** which in the opinion of the agency head will promote the best interests of the Government . . ."

Following the enactment of the Armed Forces Procurement Act of 1947, the Secretaries of the respective departments of defense (Army, Navy & Air Force) promulgated and issued joint regulations commonly referred to as the "Armed Services Procurement Regulations"[4], which regulations contained and authorized the specific partial payments clauses incorporated in the subcontracts here in question.

This very section of the Armed Service Procurement Act of 1947—Section 4a—was recently considered by this Court in *Kern-Limerick, Inc. and United States v. Scurlock, Commr.*

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[3] Subsection (b) excludes cost plus a percentage-of-costs-type contracts which are not here involved.

[4] Armed Services Procurement Regulations (A.S.P.R.) 5-407-2(1), (1947 Supplement Code of Federal Regulations Title 10, Chapter VIII, Paragraph 805,407-2, Effective November 1, 1947, Printed in 12 F. R. 7693).

Rev. of Arkansas, 347 U.S. 110, 116 (1954) wherein it was held that Congress has granted wide discretion to the defense procurement agencies in determining the type of contract which would promote the best interests of the Government.

It has long been recognized that as an incident of the general right of sovereignty the United States may, within its Constitutional powers, through its various departments, enter into contracts which are not prohibited by law and are appropriate to the exercise of such powers (*Kern-Limerick and United States v. Scurlock, Commr. Rev. of Arkansas,* 347 U.S. 110, 116 (1954); *Muschany v. United States,* 324 U.S. 49,63 (1945); *Van Brocklin v. Tennessee,* 117 U.S. 151, 154 (1886); *United States v. Linn,* 15 Pet. 290, 315-316 (1841); *United States v. Tingey,* 5 Pet. 115, 127 (1831); *United States v. Hodson,* 10 Wall. 395 (1870); *Neilson v. Lagow,* 12 How. 98 (1851)) and like a private individual may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Heim v. McCall,* 239 U.S. 175 (1915); *Ellis v. United States,* 206 U.S. 246 (1907); *Atkin v. Kansas,* 191 U.S. 207 (1903).

Thus in the absence of prohibition procurement officers clearly have authority to include partial payment-title vesting clauses in defense contracts. The inclusion of such provision is manifestly within and appropriate to the just exercise of powers granted to procurement officers by the Armed Services Procurement Act of 1947.[5]

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[5] It is manifest that such provisions contained in 80% of Air Force procurement contracts were included to assure the Federal government of complete and absolute control and ownership of essential, basic and critical war material at all times—even during the process of manufacture and it was so stipulated by the parties (Stipulation No. 2, paragraph ([illegible]), Joint Appendix (85-86)). The clause was not for the mere purpose of avoiding state ad valorem taxes, as now intimated by appellants (Jurisdictional Statement, page 5). However, even if this were the purpose of such clause, the power of Federal procurement officers to include such provision in the contract would not thereby be limited or barred. *Kern-Limerick v. Scurlock* 347 U. S. 110,116-7

The fundamental error in appellants' contention lies in their failure to recognize the clear distinction between "advance payments" and "partial payments" despite the fact that the Armed Services Procurement Regulations specifically distinguish between such payments.[6] Partial payments upon the purchase price do not fall within statutory prohibitions relative to advance payments which are in the nature of a loan. The practice of using partial payment clauses in procurement contracts has been followed since the early 1800's to the present day. The validity of such partial payment clauses with title vesting in the Government has been recognized and affirmatively approved by the courts, the Attorney General, the Comptroller General and the Armed Services. *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); In re *Read York,* 152 F (2d) 313,316 (1945); 20 *Opinions of Atty. Gen.* (U.S.) 746, 747 (1894); 29 *Opinions of Atty. Gen.* 46, 48; *Comptroller Gen. Decision* No. B-83260, 4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949); *Opinion of Judge Advocate Gen.*, SPJGC, (1945) 101118, 4 Contract Cases Fed. (C.C.H.) Sec. 60,016.

Absolute Title to the Property in Question was Vested in the United States.

It has long been recognized that where Federal procurement contracts so provide, title to material on hand and goods in process, in the possession of a contractor, vests in the United States upon receipt by the contractor of a partial payment upon the purchase price. Such title in the United States is absolute and complete—not bare legal title for security purposes—and the property thus acquired is immune from state and local ad valorem taxes, *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); *In re Read York*, 152 F (2d) 313,316 (1945); *Douglas Aircraft Co. v.*

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[6] See Appendix hereto.

Byran County, 57 Cal. App. (2d) 311 (1943); *Craig, State Tax Collector v. Ingalls Ship Building Corp.*, 192 Miss. 254 (1942); *Superior Shipbuilding Co. v. Beekley*, 175 Wis. 337 (1921); *Wright Aeronautical Corp. v. Glander*, 151 Ohio 29 (1949).

Appellants' contention that Murray followed a course of conduct, in dealing with the assessed property, inconsistent with the claim that absolute title vested in the United States is without foundation. Virtually every argument advanced by appellants in an attempt to support such contention was rejected by this Court in *United States v. Allegheny County*, 322 U.S. 174 (1944) and *United States v. Ansonia Brass and Copper Co.*, 218 U.S. 452 (1910).

The District Court and the Court of Appeals thoroughly considered all of the undisputed facts and the inferences to be drawn therefrom and rejected appellants' contention as being contrary to law and the express provisions of the subcontracts in question. Accordingly, appellants' contention (Jurisdictional Statement, pages 5-6, and 13) that Murray engaged in a cause of conduct inconsistent with the vesting of absolute title in the United States does not present a substantial question for review by this Court. *Kennedy v. Silas Mason Co.*, 334 U.S. 249,256 (1948).

Property Owned by the United States is not Subject to State and Local Ad Valorem Property Taxes by Virtue of the Fact that it is in Possession of a Private Contractor.

Appellants' argument that the "incidence" of the tax is upon Murray because they assessed the property and sent the tax bill to Murray is without validity. The "incidence" of the ad valorem personal property tax here involved is upon the property and not upon the person to whom the tax bill is sent. (See Court of Appeals opinion, 234 F (2d) 380 at 383; and *City of Detroit v. Gray*, 314 Mich. 516, 521, and *Pingree v. Auditor General*, 120 Mich. 95, 102, 109). This Court, in unequivocal language, held in *United States v. Allegheny County*, 322 U.S. 174, 187-188 (1944) that Government owned property is immune from state and local ad valorem taxes either as against the Government or the person in possession of such property. This principle was further reaffirmed in *Esso Standard Oil Co. v. Evans,* 345 U.S. 495,499 (1953), and recognized in *Kern-Limerick Inc. v. Scurlock, Commr. Rev. of Arkansas* 347 U.S. 110, 123. Appellants' mere dissatisfaction with and refusal to accept the decision of this Court in the *Allegheny* case does not thereby create a substantial question for review on appeal.

A reading of the opinion of the Court of Appeals will clearly negative the assertion that important issues were left unanswered by that Court.

The mere fact that the application of the doctrine of Federal Constitutional immunity of Federally owned property is national in its scope and importance because of the long and extensive use of partial payment-title vesting clauses in defense procurement contracts of the United States does not of itself furnish the basis for further review of principles long established by this Court and repeatedly and most recently reaffirmed.

Furthermore, the argument of appellants that the doctrine creates hardships and inequities hardly affords a basis for such review. "The equities in this important conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization" and as this Court suggested in *Allegheny* at pages 190-191, if any remedy is warranted, the "remedy lies in petition to the Federal Congress, which also is their Congress." See *Kern-Limerick v. Scurlock*, 347 U.S. 110, at 116-7.

CONCLUSION

We submit, therefore, that since the Court of Appeals did not declare any State or local statute invalid as being repugnant to the Constitution, laws or treaties of the United States, the Court is without jurisdiction to entertain the appeal. Furthermore, the decision below is clearly correct, the questions involved do not call for further review by this Court and no substantial question is presented. It is therefore respectfully submitted that the appeal be dismissed or that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

VICTOR W. KLEIN
WILLIAM M. SAXTON
Attorneys for Appellee,
THE MURRAY CORPORATION OF AMERICA.

September 24, 1956.

Appendix

Armed Services Procurement Regulation

Excerpt re advance vs. partial payment

"**Nature of advance payments.** Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. **Advance payments are to be distinguished from 'partial payments' and 'progress payments' and other payments made because of performance or part performance of a contract.**"

32 Code of Fed. Reg., 1949 ed., 1950 Pocket Supp., Chap. IV., Sub-part E, Sec. 402-501.

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No.

18

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No. ~~401~~ 18

In the Supreme Court of the United States

October Term, 1956 7

City of Detroit, a Michigan Municipal Corporation, and County of Wayne, a Michigan Constitutional Body Corporate, appellants

v.

The Murray Corporation of America, a Delaware Corporation, and the United States of America

---

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

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INDEX

Page

(A) THIS COURT LACKS JURISDICTION OF THE APPEAL 2

(B) THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL 3

CITATIONS

Cases:

Baxter v. *Continental Casualty Co.*, 284 U. S. 578 2

Bradford Electric Co. v. *Clapper*, 284 U. S. 221 2

Douglas Aircraft Co. v. *Byram*, 57 Cal. App. 2d 311 5

Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110 .... 3, 4, 6

Pub. Serv. Comm. v. *Batesville Tel. Co.*, 284 U. S. 6 2

Read-York, In Re, 152 F. 2d 313 5

United States v. *Allegheny County*, 322 U. S. 174 .... 3, 6

United States v. *Ansonia Brass &c. Co.*, 218 U. S. 452 5

Wilson v. *Cook*, 327 U. S. 474 3

Statutes:

Judicial Code, Sec. 240 2

Revised Statutes, Sec. 3648 (31 U. S. C. 1952 ed., Sec. 529) 4

28 U. S. C., Sec. 1254 (2) 2

Miscellaneous:

1 Comp. Gen. 143 (1921) 5

20 Comp. Gen. 917 (1941) 5

28 Comp. Gen. 468 (1949) 5

18 Op. A. G. 105 (1885) 5

20 Op. A. G. 746 (1894) 5

29 Op. A. G. 46 (1911) 5

Revised Rules of the Supreme Court of the United States, Rule 16 1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 401

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, APPELLANTS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraph 1, of the Revised Rules of this Court, the United States of America, intervenor and appellee, moves (*a*) that the appeal be dismissed on the ground that the appeal is not within the jurisdiction of this Court, and (*b*) in the alternative, that the judgment of United States Court of Appeals for the Sixth Circuit be affirmed on the ground that the questions raised by the appellants are so unsubstantial as not to need further argument.

(A) THIS COURT LACKS JURISDICTION OF THE APPEAL

Appellants contend that jurisdiction is conferred on this Court by 28 U. S. C., Section 1254 (2), which reads as follows:

> SEC. 1254. *Courts of appeals; certiorari; appeal; certified questions*
>
> Cases in the courts of appeals may be reviewed by the following methods:
>
> * * * * *
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;
>
> * * * * *

Section 1254 (2) governing appeals from the Courts of Appeals is based upon former Section 240 of the Judicial Code, as amended. Under both provisions appeal to this Court is limited to cases where a state statute has been held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. If, as we believe to be manifest in the instant case, the Court of Appeals did not hold a state law invalid, this Court lacks jurisdiction of the appeal. *Pub. Serv. Comm.* v. *Batesville Tel. Co.,* 284 U. S. 6; *Bradford Electric Co.* v. *Clapper,* 284 U. S. 221; *Baxter* v. *Continental Casualty Co.,* 284 U. S. 578.

Here, neither the District Court nor the Court of Appeals, which affirmed the trial court, held any state law invalid. The principal issue argued and decided was whether, under the terms of certain sub-contracts, the United States was the absolute owner of particular personal property in the possession of the Murray Corporation of America on January 1, 1952. Appellants assessed to the Murray Corporation an *ad valorem* personal property tax upon that property. Since there was no statute or local ordinance which even purported to levy a tax on property belonging to the United States, the decision below required only a consideration of the validity of the tax assessment as applied to the particular property involved. Once the lower courts found, as they did, that the United States had authority to and did acquire ownership of the property in question, it necessarily followed that the tax could not be imposed. *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

Since the Court of Appeals was required to consider only whether the particular property belonged to the United States and hence was not subject to tax, and since no state statute was declared invalid under the Federal Constitution, this Court is without jurisdiction on appeal. Cf. *Wilson* v. *Cook*, 327 U. S. 474. Accordingly, it is respectfully submitted that the appeal should be dismissed.

(B) THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL

In any event, it is submitted that the judgment of the Court of Appeals for the Sixth Circuit should be affirmed, since it is manifest that the questions on which the decision depends are so unsubstantial as not to need further argument.

In their Jurisdictional Statement (pp. 5-6) appellants present three questions:

> First, did the contracting officers of the United States have authority to enter into contracts which provide for the vesting of title to parts, materials, etc., in the United States upon the making of a partial payment?
>
> Second, was the title which vested in the United States under the contracts absolute title or merely paper or security title?
>
> Third, is a state or local *ad valorem* property tax on the property of the United States constitutionally valid where the tax was assessed to the contractor and not directly to the United States?

Each of these questions was fully considered by the Court of Appeals and, on the basis of the facts found, was correctly decided in accordance with the decisions of this Court.

1. As to the first question, namely, the authority of the Government's contracting officers to enter into partial payment contracts, *Kern-Limerick, Inc.* v. *Scurlock* 347 U. S. 110, affirms the authority of contracting officers to negotiate any type of contract not specifically prohibited which will promote the best interests of the Government. Asserting that the Government is specifically prohibited by statute from entering into contracts providing for partial payments, appellants rely upon Section 3648, Revised Statutes (31 U. S. C. 1952 ed., Sec. 529). (Jurisdictional Statement 11a-12a.) However, that provision prohibits only pay-

ments in advance of any performance of services or payments in advance of delivery of articles, title to which is not taken prior to delivery. Appellants have failed to recognize the fundamental distinction between advance or unearned payments, which are not involved here, and partial payments, such as were made to the contractor here.

As early as 1885, Section 3648 was interpreted by the Attorney General as permitting the making of partial payments, provided title to the property passed to the Government at the time such payments were made. 18 Op. A. G. 105 (1885). See also to the same affect: 20 Op. A. G. 746 (1894); 29 Op. A. G. 46 (1911). The same view consistently has been expressed by the Comptroller General. 1 Comp. Gen. 143 (1921); 20 Comp. Gen. 917 (1941); 28 Comp. Gen. 468, 470 (1949). Cf. *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452, 466–470; *Douglas Aircraft Co.* v. *Byram,* 57 Cal. App. 2d 311; *In Re Read-York,* 152 F. 2d 313 (C. A. 7th).

The Court of Appeals correctly rejected appellants' interpretation of Section 3648, and affirmed the trial court's holding that the partial payment clauses were not invalid for want of authority or for non-conformity with the federal statutes. (Jurisdictional Statement 4a.)

2. The second question, namely, whether absolute title or merely security title vested in the United States, was settled in *United States* v. *Ansonia Brass &c. Co.,* 218 U. S. 452, 466–470. The contract there provided that (p. 466): "The parts paid for under

the system of partial payments * * * shall become thereby the sole property of the United States * * *." The contractual provision here provides that: "Upon the making of any partial payment * * * title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced * * * shall forthwith vest in the Government * * *." (Jurisdiction Statement 13a.) The contractual provisions in both cases express the intention of the parties that the Government should acquire ownership of the property prior to completion. In both contracts, particular provisions, such as payment of insurance premiums by the contractor and retention by the Government of the right to reject upon completion, were not inconsistent with the vesting of title in the United States and did not detract from the binding force of the distinct contract provisions making the United States the owner.

The Court of Appeals correctly rejected appellants' view of the contract, stating that it concurred in the trial court's conclusion that a reading of the contract left no doubt that full title, not a mere security title, vested in the Government upon the making of partial payments.

3. The third question, namely, whether the *ad valorem* property tax on the property of the United States is constitutionally valid because the tax was assessed to the contractor and not directly to the United States, is completely answered by *United States* v. *Allegheny County*, 322 U. S. 174, and *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. Property

which belongs to the Federal Government is not subject to local property taxation merely because the property is in the possession of another or merely because the tax is to be paid by a private party.

Accordingly, it is respectfully submitted that the appeal should be dismissed or, in the alternative, that the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

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Nos.

18

36

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INDEX

Page

Argument:

I. Errors noted in presentation and construction of agreed facts by Government and Appellee 2

II. Appellants may question authority for and validity of provisions of defense contracts or sub-contracts without being parties thereto.. 9

III. Materials are not an equivalent for specific items being purchased by sub-contracts to overcome prohibition of R. S. §3648........ 11

IV. Ansonia is not authority that absolute title can be claimed to materials to be incorporated into end items.......................... 16

  Tentative nature of title indicates security for Government's investment...... 21

V. These non-discriminatory taxes are valid as imposing no direct burden on the Federal Government in violation of its implied constitutional immunity 26

  Substance, not form or name, of tax controls 31

  Analysis and comparison of Government's and Appellee's case authorities with Appellants' authorities.......... 35

  (a) United States v. Allegheny......... 35

  (b) Van Brocklin v. Tennessee.......... 36

  (c) Lee v. Osceola Imp. Dist............ 41

  (d) United States v. Mayo............. 42

  (e) S. R. A., Inc. v. Minnesota; New Brunswick v. United States......... 43

Conclusion 47

AUTHORITIES CITED

Decisions

Page

Alabama, State of v. King and Boozer, 314 U. S. 1 29, 33, 37, 43

American Boiler Works, In re, 220 F. 2d 319....... 10, 19

American Motors Corp. and United States, Intervenor, v. City of Kenosha, 274 Wis. 315......7, 8, 23, 24

Annis Furs, Inc. v. City of Detroit, 336 Mich. 527, 531 33

Clarkson v. Stevens, 106 U. S. 505..........18, 20, 21, 25

Collector v. Day, 11 Wall. 113...................37, 38, 40

Craig v. Ingalls, 192 Miss. 254.................... 19

Curry v. United States, 314 U. S. 14............... 29

Dobbins v. Erie County, 16 Pet. 435..........37, 38, 39, 40

Douglas Aircraft Company v. Byram, 57 Cal. App. (2d) 311 19

Educational Films Corp. v. Ward, 282 U. S. 379..... 33

Esso Standard Oil v. Evans, 345 U. S. 495........29, 32, 35

Graves v. New York, 306 U. S. 466........27, 29, 32, 36, 37, 39, 41, 43

Graves v. Texas Co., 298 U. S. 393................ 27

Home Insurance Co. v. New York, 134 U. S. 594..... 33

James v. Dravo Contracting Company, 302 U. S. 134 28, 29, 32, 36, 37, 41, 43, 45, 46

Kern-Limerick, Inc. and United States of America v. Scurlock, 347 U. S. 110............11, 14, 19, 26, 28, 36

Landa v. Commissioner of Internal Revenue, 206 F. 2d 431 10

Land O'Lakes Dairy Co. v. Wadena County, 338 U. S. 897 29

Lee v. Osceola Imp. Dist., 268 U. S. 643....26, 28, 36, 40, 41

Page
Mayo v. United States, 319 U. S. 441 .... 28, 36
M'Culloch v. Maryland, 4 Wheat. 570 .... 26, 27, 28, 29, 38, 43, 45
New Brunswick v. United States, 276 U. S. 547 ... 28, 29, 33, 36, 40, 41, 43, 44, 45
Northern Pacific R. R. v. Myers, 172 U. S. 589 44
Oklahoma Tax Comm. v. Texas Co., 336 U. S. 342 ... 29, 36
Panhandle Oil Co. v. Mississippi, 277 U. S. 218 27
Penn Dairies v. Milk Control Comm., 318 U. S. 261 43
Plummer v. Coles, 173 U. S. 115 33
Re Read-York, 152 F. (2d) 313 .... 19, 33
Rogers v. Graves, 299 U. S. 401 27
S. R. A., Inc. v. Minnesota, 327 U. S. 558 .. 28, 29, 33, 36, 40, 41, 43, 44, 45
Scofield v. Greer, 185 F. 2d 551 10
Superior Shipbuilding Company v. Beckley, 175 Wis. 337 19
Thomson v. Union Pacific R. R., 76 U. S. 792 ...... 29, 32, 36
Union Pacific R. R. v. Peniston, 85 U. S. 787 .... 28, 29, 30, 36
United States v. Alabama, 313 U. S. 273 .... 36, 45
United States v. Allegheny County, 322 U. S. 174 .. 11, 19, 26, 28, 31, 34, 35, 36, 40, 44, 45
United States v. Ansonia Brass & Copper Co., 218 U. S. 452 .... 4, 11, 12, 14, 16, 17, 19, 20, 21
United States v. City of Detroit, 345 Mich. 601 ...... 32, 33
United States v. Lennox Metal Mfg. Co., 225 F. 2d 302 24
United States v. Mayo, 47 F. 552, 557 42
United States v. State of Arizona, 295 U. S. 174 12
Van Brocklin v. State of Tennesseee, 117 U. S. 151 27, 28, 36, 37, 38, 40, 43
Wright Aeronautical Corp. v. Glander, 151 Ohio 29 .. 19

Federal Statutes

Page

First War Powers Act of 1941, Title II, c. 593, 55 Stat. 838, as amended........................12, 15, 20

Revised Statutes, Sec. 3648, as amended, c. 744, 60 Stat. 809 ....11, 12, 13, 14, 15

Congressional Hearings and Other References

House Report 558, II, U. S. Code Congressional and Administrative News, pp. 1770-73............. 15

House Report 1507, II, House Misc. Reports VII, U. S. 10558 14

Miscellaneous

Fordham Law Review, XXVI, No. 2, p. 224 (Whelan) 3, 5, 10, 12, 16, 18

58 Harvard Law Review (Powell), p. 784.......... 34

18 Op. A. G. 101................................ 13

18 Op. A. G. 105................................ 13

1 Comp. Gen. 143-146......................... 15, 20

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

◆

Nos. 18 and 36

◆

CITY OF DETROIT,
a Michigan Municipal Corporation,
and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants and Petitioners,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Appellee and Respondent
and
THE UNITED STATES OF AMERICA,
Intervenor

◆

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

◆

APPELLANTS' REPLY BRIEF

◆

ARGUMENT

I.

ERRORS NOTED IN PRESENTATION AND CONSTRUCTION OF AGREED FACTS BY GOVERNMENT AND APPELLEE

A primary problem in most litigation generally stems from sharply disputed questions of fact. This has been eliminated here. The Transcript of Record is composed of (1) the pleadings; (2) certain stipulations entered into to present what witnesses would have testified to, had there been a trial (in view of appellee's motion for summary judgment); (3) material excerpts from contract documents between the Government and its prime contractors as well as between the latter and appellee; and (4) proceedings and opinions of the Courts below.

Appellants are concerned that appellee and even the Government, in their briefs, have not adhered strictly to this record. Six instances are noted and discussed below in the interest of clarification. (Sub-sections A-F, *infra.*)

A.

The suggested inference by the United States (Br. p. 4), even if unintentional, that it was contemplated that partial payments were to be made *by the Government* to appellee as a subcontractor in like manner as provided to be made by the Government to Kaiser is not borne out by the record.[1]

The same error occurs at p. 66 of Brief for Appellee.

Remittances of payments from the respective prime contractors, Ex. 10 and Ex. 11 (R. 258-261) clearly indicate payments to appellee from Kaiser and Wright and not from the Government.

---

[1] Murray-Kaiser letter sub-contract, Ex. 2-A, Paragraphs 4, 6 (R. 170-1).

Contrary to appellee's contention, these were not paid on account of the purchase price since prices had not yet been determined. Nor were they for items ordered, work done, in process or ready for inspection and delivery—but only on account of costs.[2] For classification of progress payments see p. 227 of article on Government Supply Contracts by John W. Whelan, *Fordham Law Review*, Summer, 1957 (Vol. XXVI No. 2, p. 224).[3]

Here partial payments were never regarded as an obligation of the Government to appellee. There was never anything more than an undertaking by the Government to authorize partial payments after determination of evidence of costs submitted of the property on which payment is made. Ex. 2B, 11(a) (R. 175). This is supported by the fact that wherever there appears approval of the subcontracts by the Government, one also finds disclaimer of obligation to the vendor (appellee) (R. 172, 221).

B.

Any inference, even if unintentional, at p. 65 of Brief of Appellee that these sub-contracts provided " 'that the builder (Murray) shall sell and the purchaser shall buy * * * before its completion and at different stages of its progress * * *' " is a complete departure from the record in this case.[4]

---

[2] Stip. No. 4(3) R. 94.

[3] It becomes clear at the outset of this article that the new regulations there discussed deal with progress payments much as earlier regulations dealt with partial payments. (See Note 25 at p. 230, Ibid.)

[4] Distinction noted between progress payments on percentage of completion, or stage of completion and based on costs incurred (p. 236 Ibid).

The manner in which this phrase appears in quotation marks might lead the Court to believe that appellee's counsel is quoting from its sub-contracts. There is no such clause or phrase in these contracts.

Appellee is trying to borrow support from *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452 to which it is plainly not entitled.

Appellee undertook to manufacture certain airplane parts and sub-assemblies for Kaiser and engine parts and sub-assemblies for Wright and not for the Government.[5]

Appellee was not paid in installments nor at stages of completion of any of such parts, engine parts or sub-assemblies as in Ansonia. It was permitted only to obtain reimbursement for its costs to the extent provided in respective letter subcontracts (Stip. No. 2(7) R. 88).

To further distinguish the facts here from Ansonia, the term "parts" found in the subcontracts plainly refers to components of engines or aircraft. Each of such specific parts to be manufactured and delivered by appellee was expected to be an acceptable completed unit in accordance with specifications and was clearly not being purchased before its completion and at different stages of its progress as the contract provided for the Benyuard in Ansonia.

---

[5] Subject of the present sub-contracts was admittedly certain parts and sub-assemblies (Kaiser, see Appellee's Brief 9-10) and engine parts and sub-assemblies (Wright, see 15-16, ibid), as specified therein, to be manufactured by appellee and sold to said prime contractors. (See Brief, United States, 4.)

The partial payment provisions (Par. 11) there referred to had been deleted from the Kaiser prime contract by amendment No. 2 (R. 156-157) dated 25 Jan. 1951. Reinstatement followed on 29 March 1951 pursuant to terms of the letter subcontract entered into between Kaiser and appellee on 23 March 1951 (R. 170).

C.

Again, the United States (Br. p. 34) makes an effort to refute appellants' claim of rights of ownership which appellee was entitled to exercise over the goods. The argument is made that payment of an agreed price is customarily made to the owner of the property by the one acquiring it for such agreed price (Br. p. 35).[6] The inference suggested is that the United States is the owner because it is the recipient of the agreed price.[7]

In support of its argument (pp. 34-35) an excerpt is quoted from sub-paragraph (a) as follows:

> "The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, * * *."

Lifted out of context as it is, it is obvious to the unprejudiced eye that this does not resemble close-handed control of one claiming beneficial ownership of property. The Government is not in the habit of permitting its sole property to be so lightly disposed of by others reserving only terms of disposition.

However, when the excerpt is read in relation to another clause of sub-paragraph (d) quoted only in part at p. 35 of Brief for the United States but which reads in full as follows:

---

[6] (*Contra*, see pp. 253-254, *Fordham Law Review*, *supra*.)

[7] To avoid the possibility of the term "agreed price" misleading the Court, it must be recalled that the letter subcontracts contained no agreed price for specific end items. Moreover, appellee was not selling anything whatever to the United States in these particular sub-contracts, only to its prime contractors.

> "The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition) shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be re-reduced accordingly."

it unmasks interest of the Government in the price up to the point of protecting its investment. Beyond that, the price (or proceeds) may go wherever they belong apparently without regard to appellee's claim of title being *in the Government to the property acquired or disposed of.*

Appellants submit the meaning is clear when the language is fully presented to the Court. The intent of the Government's own language is to protect its investment rather than the property.[5]

D.

An even more untenable construction of the same portion of sub-paragraph(d) is urged by appellee (Br. pp. 75-76). It is claimed:

> "The above clause recognizes the ownership of the Government and permits the contractor to acquire or dispose of the property only 'at the option of the Government' and then only 'upon terms approved by the Contracting Officer.' * * *"

This clause lifted out of said sub-paragraph plainly reads (Par. 11d, R. 176):

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[5] For intent of drafters of clause, see Brief of United States, pp. 39-40.

> "The contractor, either before or after receipt of notice of termination at the *option of the Government*, may acquire or dispose of property title to which is vested in the Government under the Article, upon terms approved by the Contracting Officer." (Emphasis supplied.)

Reading the highlighted phrase as if the comma precedes, instead of follows it is clearly erroneous. As printed, the option of the Government pertains to notice of termination and not to right of acquiring or disposing of the property in question beyond mere approval of terms.

Moreover approval of terms by the contracting officer was plainly a bookkeeping function to maintain security for government financing. Stip. No. 2, 4a-d (R. 87). *American Motors and U. S. v. City of Kenosha*, 274 Wisc. 315, 324.

E.

At bottom of p. 42 statement is made in Brief for United States that gives the impression that the Government is the one that "chooses to make payments and take ownership of the property in advance of its delivery as a finished product."[9]

The Government exercised a choice only in the inclusion of the partial-payment title-passage clause in the Procurement Regulations and, of course, in selection of terminology of the clause by Government draftsmen.[10] However, from that point on, the negotiating contractor chooses (1) whether to request it in its contract, (2) how much (up to the maximum allowed) he should request in negotiating the contract, (3) amount of costs incurred he should in fact request reimbursement for during production, and (4) the time when such request should be made.

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[9] Argument made is *contra* to provisions of letter sub-contracts referred to under our subdivisions A and B, *supra*.

[10] Brief for United States, pp. 39-40.

In effect the clause gives no protection to the Government if it is left to the private contractor's initiative in this regard. (See pp. 116-117 of Appellants' Brief.)

F.

An effort to make title and ownership appear synonymous—as if interchangeable is made by the Government (Br. pp. 14, 16, 31, 32 and 33) where discussion appears on Appellants' contention that the title of the Government to the materials was only a security or paper title.

The Government has not refuted or answered by any authority the reasoning of the Wisconsin Supreme Court in American Motors at p. 322 of 274 Wisc. that title and ownership are distinguishable. The conclusion of that Court was:

> "Conceding that title was transferred, there was, however, no true transfer of ownership."

Analysis of entire contract including rights reserved to Appellee (Appellants' Br. p. 58, *et seq.*) and conduct of the parties thereunder (Br. p. 69, *et seq.*) brings the present case squarely within the determination of the Wisconsin Supreme Court, *supra*.

II.

APPELLANTS MAY QUESTION AUTHORITY FOR AND VALIDITY OF PROVISIONS OF DEFENSE CONTRACTS OR SUB-CONTRACTS WITHOUT BEING PARTIES THERETO.

(In reply to Appellee's Counter-Question I)

Appellee (Murray) introduces as its first question a matter volunteered by the opinion of the District Judge and left unnoticed by the Court of Appeals. Question is now raised as to Appellants' right to collaterally attack provisions of the defense contracts to which neither Appellant is a party.

It is Appellants' position that there is no merit in the District Judge's suggestion nor in Appellee's question. None of the cases cited as authority by Appellee deal with tax questions or involve the United States on the one hand and a state or local unit of a state on the other. All deal with contractors attempting to get out from under an undertaking with the Government or unsuccessful bidders who claim rights where others obtained Government contracts.

Appellee's entire case is predicated upon the substance of certain contracts between itself and prime contractors and of other contracts between the latter and the Government. It is contended that particular provisions in such contracts nullify local taxes.

The claim that Appellants may not challenge the validity of provisions of those contracts, when the very essence of Murray's lawsuit is based on such provisions, would remove rights to which any defendants are entitled.

Were the situation reversed, such a position would be strenuously opposed by the Government. For example, if the City of Detroit were to enter into a contract with Murray and provide therein that no social security taxes be included as part of the cost of the article to be manufactured, could it be said that the Government was barred from resisting the effect of such a provision upon it in litigation to which it became a party? The answer is obviously "No." No parties, whether state or private, should be permitted to overcome a federal tax by virtue of contract provisions to which the Government was not a party.

The very opposite of Appellee's contention here was upheld when the United States Government was permitted to challenge a written agreement for the reason that it was not at party to the contract. *Scofield v. Greer,* 185 F. 2d 551.

In *Landa v. Commr. of Internal Revenue,* 206 F. 2d 431, it was stated (p. 432):

> "Generally in the field of taxation, administrators of the laws and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding. The taxpayer as well as the Commissioner of Internal Revenue is entitled to the benefit of this rule. Moreover, the oral testimony here was not barred by the parol evidence rule, since the Commissioner was not a party or privy of a party to the written agreements."

Our only response to the oracular pronouncement (Appellee's Br. 33) quoted from *In re American Boiler Works,* 220 F. 2nd 319 at 321 is that the writer of that opinion would undoubtedly consider the matter differently had the issues and briefs in this case been before him there.[11]

It is significant that the first counter-question raised by appellee is not joined in by the United States in its brief.

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[11] *Fordham Law Review, supra,* p. 260.

III.

MATERIALS ARE NOT AN EQUIVALENT FOR SPECIFIC ITEMS BEING PURCHASED BY SUB-CONTRACTS TO OVERCOME PROHIBITION OF ~~R. S. §3648~~

(In reply to Government's Question I and Appellee's Question II)

Appellee and the Government rely principally on three decisions of this Court.

1. *United States v. Allegheny*, 322 U. S. 174, has been distinguished by Appellants (Br. 47-52; 120-125) refuting application to the facts here of the inflexible rule claimed from it.

2. *Kern-Limerick, Inc., and United States v. Scurlock*, 374 U. S. 110, has been discussed with our documented argument (Br. 37-44 Ibid.) that if this Court had had before it Reports of Committee Hearings prior to adoption of Armed Services Procurement Act of 1947 the majority opinion might have been otherwise (Br. 41, 44).

3. *United States v. Ansonia Brass & Copper Co.*, 218 U. S. 452, referred to at p. 4, *supra*, is claimed as absolute authority by appellee and the Government. They assume that this Court will conclude the facts at hand are governed by the determination in *Ansonia*.[12]

Our position is that Ansonia is authority solely for the proposition that the title taken therein to parts of a vessel at specified stages of construction (which are the subject of the contract) and paid for was superior to any lien claim under state law. In the cited case a portion of the contract dealt with purchase of a naval dredge in completed parts at specified stages of construction. When installment payments were made at such stages the ownership clause provided that parts of the vessel thus paid for became thereby the sole property of the United States and that insurance be effected by the contractor on behalf of the Government to at least the amount of each partial payment (P. 466 of 218 U. S.). The Government actually agreed to purchase the vessel in parts.

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[12] Further analysis of the facts in *Ansonia* will be found in connection with the fourth section of this Reply, *infra* p. 17.

This is far from being authority for making of partial payments and taking title to materials which are not the subject matter of the contract, but are only the ingredients purchased by an independent subcontractor to enable it to manufacture specific end items which had yet to be inspected, delivered and paid for at prices to be negotiated between the parties to the contract.

As already pointed out, appellee's sub-contracts were not for purchase and sale of materials but admittedly only for specific acceptable end items (Appellee's Br. 10, 16; Brief for United States, 4, 8) (Appellants' Br. 113-115)[13]

Based on the erroneous premise that the facts here and in Ansonia are identical, Appellee and the Government challenge Appellants' contention (Br. 29) that Rev. Stat. 3648 defines and limits the powers of government officers herein except as Congress otherwise directs.[14]

Since Appellee's position (Br. 43) is included in the broader presentation by the Government (Br. 15-22) we address ourselves to the latter.

To illustrate how the Government strays from the plain language and intent of §3648 we have only to begin with its own analysis of provisions of that statute (Br. 19).

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[13] *Fordham Law Review*, *supra*, p. 256, Note 126.

[14] This prohibition affects action by administrative officers unless Congress gives them further permission. *United States v. Arizona*, 295 U. S. 174, accordingly controls unless the First War Powers Act of 1941, Title II is claimed as permissive authority by the Government. See *infra*, pp. 15-16.

> "Section 3648, as amended, prohibits the making of advance payments of any kind. It also prohibits payments being made on a contract under circumstances where the Government does not at the time receive an equivalent."[15]

A distinction may be noted in this analysis between "advance payments" and generic term "payment". Appellants have not claimed amounts received by appellee were specifically advance payments. Our position is that the procedure followed here violated §3648 regardless of any name given the payment by procurement officers.

However, assuming receipt of an equivalent is sufficient, does the transfer of title to materials as such satisfy the statute which bars payment in excess of the value of the service rendered or of the ariteles delivered previously to such payment? We submit no decisions of this Court support such a proposition.

The Government claims there is no violation of §3648 because it only has to obtain an equivalent for "articles delivered". This it urges has been accomplished by taking title to the materials in appellee's possession, as "property acquired" by the Government.

We cannot agree however that acquisition of title to materials which are not the subject matter of the contract satisfies the plain meaning of "articles delivered" which perforce are the subject of the contract. As illustration of how the Government arrives at its erroneous conclusion, we note the following shifting from one phrase to another in the course of its presentation (Br. 15-22):

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[15] Cited in support are two Attorney General Opinions. 18 Op. A. G. 105 deals with a ship wholly finished but for a fractured shaft which prevented trial trip and formal acceptance. The opinion approved payment of all of the tenth payment (i. e., installment), except for a named sum to be reserved, on the premise that the money had been actually earned and the Government had a lien upon the ship for all payments made with sureties to guaranteee full completion and good workmanship. 18 Op. A. G. 101 is less applicable, dealing with modification of the time for paying the ten per centum reserved upon installments on contracts for construction of several vessels. In neither is the character of the Government's interest determined beyond obtaining security.

At p. 15 in headnote: *property produced or acquired under the contract.* In the text which follows on the same page: *contract property.* On p. 16 *property involved.* On p. 17: *authorized materials.*[16] Below on same page: *property in question.* On p. 19: *material and work in question.*

In the concluding paragraph of the first section, the Government (Br. 19) states that appellants urge "that Sec. 3648 Revised Statutes, as amended, expressly, and the Armed Services Procurement Act of 1947, by implication, prohibit the making of partial payments where the United States takes title to the *work.*"

Appellants have no choice but to deny that they so intended due to use of the term "*work*" which is one of the many synonymous employed by the Government to lead the Court to believe that "*property acquired*" is no different than "*articles delivered.*"[17]

At p. 20, the paraphrasing continues with *work in progress*[18] and concludes on p. 22 with a statement that "it is untenable to conclude now that Congress intended by

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[16] Kern-Limerick is cited above as if authority to procure authorized materials. There, subject of the contract was two tractors *in esse* and not materials bought to be incorporated by the Government into an end product.

[17] See appendix to Report No. 1507 II, House Misc. Reports VII, U. S. 10558 (Cited in Appellants' Brief, p. 35).

[18] Other cited Opinions of Attorney-General and Comptroller-General as well as Ansonia are answered in Section IV, *infra*, p. 20.

§3648, as amended, to prohibit the making of partial payments where the value of the services performed and the *property acquired* exceed the amount of the payments.

Absence of logical relevance is apparent when the phrase "property acquired" which is not the subject of the contract is compared with "articles delivered." It also demonstrates how far administrative officers have extended procurement procedures in avoidance of the prohibition in §3648 against advancement *to the contractor of funds with which to enable him to perform his contract.* This italicized language is not ours but is lifted out of 1 Comp. Gen. 143, 145-146 (1921).

Being thus prohibited, the method of financing attempted here should be stricken down as unauthorized. There is accordingly no assumed authority nor any specific authority in the Armed Services Procurement Act of 1947 except as Sec. 5 overcomes such prohibition.

The only possible authority stems from the First War Powers Act of 1941 (C 593, 55 Stat. 838) as amended.

This we discussed in detail (Br. 34-36) and the Government responded in footnote at p. 16 of its Brief.

Appellee's sub-contracts and those of its prime contractors consistently cited as authority (R. 143, 191) Armed Services Procurement Act of 1947, Sec. 2 (c) (10). At no time was any claim made of authority from Executive Order 10210 (Feb. 2, 1951, 16 F. R. 1049) issued pursuant to the reactivated War Powers Act, *supra.*[19]

No compulsion existed thereunder to use the disputed title passage clause in view of broad although temporary authority to enter into contracts without competitive bidding in those cases where bidding was still required; to enter into contracts without performance bonds; to amend or modify contracts; and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment or modification of the contract whenever it was deemed such action would facilitate the prosecution of the war. In practice, this authority is relied on in only a few categories and not as a usual basis for making partial or progress payments.[20]

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[19] Purpose of extension appears in House Report No. 558, Vol. 2, U. S. Code Congressional and Administrative News, pp. 1770-73.

In view of the Government's suggestion that this Court need not reach that question (Br. footnote, p. 16), we wonder if its sole possible ground for authority under said War Powers Act is not here being pressed.

IV.

ANSONIA IS NOT AUTHORITY THAT ABSOLUTE TITLE CAN BE CLAIMED TO MATERIALS TO BE INCORPORATED INTO END ITEMS

(In reply to Government's Question II and Appellee's Question III)

In responding to Appellants' contention that the title here was a "paper title" the Government claims (Br. 31) that the language used in the subcontracts to transfer ownership is language which the courts have consistently approved or have themselves used to express such a meaning.

Appellee cites the same authorities as having held that *these* partial payment-title vesting clauses effectively vested title and beneficial ownership to the material and work in process in the Government—as distinguished from mere security or lien title (Br. 64).

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[20] *Fordham Law Review*, *supra*, p. 234.

We submit that the manner in which the vesting language is here used and the specific issues raised make this case a novel one.

Neither Appellee nor the Government stop to analyze the facts here and compare them against the authorities cited. We contend that their citations cannot be accepted as absolutes. When examined, they do not support the conclusion that absolute title was intended to be taken to secondary items, i.e., materials acquired by an independent subcontractor to be incorporated into the specific items with which the subcontracts are principally concerned.

The Ansonia case, *supra*,[21] is claimed by Appellee to be the primary and controlling authority for virtually all of the other cases there cited. Appellee fails, however, to take cognizance of an important difference in facts in that case, which clearly distinguishes it from the present case.

In *Ansonia* the contract of the Government, in part, expressly dealt with the purchase of a naval dredge in *completed parts of the vessel*, with provision for *inspection* of and *payment* for such completed parts of the vessel, in stated equal installments as the work progressed (218 U. S. 465-466). The contract further provided that the *parts of the vessel thus paid for* by partial or progress payments would become thereby the sole property of the United States. It did not, as do Appellee's subcontracts, undertake to pay partial payments based on costs with title passing to materials or parts to be, or intended to be, incorporated into a specific end product.

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[21] See pp. 11-12, *supra*.

The contractor there agreed to sell and the Government agreed to buy each completed part of the vessel and to pay full price therefor.

Here, the subject matter of both the prime contracts and the subcontracts were the specific end items of which the Government expected to take delivery—engines and parts and sub-assemblies to be incorporated in completed acceptable aircraft units. The Government neither purchased nor ever intended to have beneficial use of materials or to take delivery of them, except as they were formed and processed into the specified end items. Hence *materials*, to which the Government was interested in taking title, *are not the subject matter of the contract.*[22]

Similar distinctions were noted by this Court in *Ansonia* between contract provisions in that case and those in *Clarkson v. Stevens*, 106 U. S. 505 (27 L. Ed. 139, 11 Sup. Ct. Rep. 200), in which it rejected a claim that title to a vessel passed to the Government. It makes this analysis (p. 469):

> "It is suggested, in this connection, that the contract with the government in the case of the Benyuard is not different in effect than the one passed upon in *Clarkson v. Stevens*, 106 U. S. 505, 27 L. Ed. 139, 1 Sup. Ct. Rep. 200. In that case the contract provided that the materials received at the yard for the construction of the steamer

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[22] "The fact should never be lost sight of that the 'Progress Payments' clause of which we are speaking is used principally in fixed-price supply contracts. Under such contracts, the Government is buyer and the contractor is seller of end item, whether a tank or gun or an airplane or some item of electronic equipment. The Government is not contracting for the purchase of title-vested property, as such, but only for the acquisition of such part of that property as is incorporated in the end items." *Fordham Law Review, supra*, 256, footnote 126. See also note 3 on p. 3, *supra*, with reference to treatment of progress payments under new regulations as partial payments were treated under the old regulations, applicable here.

> should be distinctly marked with the letters 'U. S.,' and should become the property of and belong to the United States. There was no provision that title to the vessel should vest in the United States as fast as parts thereof were constructed, and Mr. Justice Mathews, who delivered the opinion of the court, approved the opinion of the court of errors and appeals of New Jersey, expressing the view that the declaration as to the materials excluded the implication sought to be raised as to the title in the unfinished ship: 'for,' said Mr. Justice Mathews, 'the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment.' (p. 516)."

Only failure to recognize such distinction—between materials and the end items being purchased—or failure of counsel to point it out can account for the apparent acceptance of Ansonia's conclusion by lower courts in decisions cited by Appellee as controlled by *Ansonia*. The cases cited are also distinguishable from the present case on facts.[23]

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[23] In *Re Read-York*, 152 F. (2d) 313; *Douglas Aircraft Co., Inc., v. Byram*, 57 Cal. App. (2d) 311, 134 Pac. (2d) 15; and *Wright Aeronautical Corp. v. Glander*, 151 Ohio 29, 84 N. E. (2d) 483, title clauses were the same in each case and provided that title to all property on which partial payments are made prior to the contract's completion shall vest in the Government *in its then condition*. In *Craig v. Ingalls*, 192 Miss. 254, 5 So. (2d) 676; *Superior Shipbuilding Co. v. Beckley*, 175 Wis. 337, 185 N. W. 199; and *In re American Boiler Works*, 220 F. (2d) 319, title vesting provisions in each case refer to materials, and, respectively, to "the vessel itself," to "said vessel, either completed or under construction, *insofar as it shall have been inspected and approved and paid for* * * *," and to "vessels under construction." On materially different facts from Ansonia and here, the Court found in the *Superior Shipbuilding* case, cited in this footnote, that the contractor was little more than an agent employed by the Government to perform certain work for it.

Appellee also cites as supporting its view the cases of *Kern-Limerick, Inc., v. Scurlock*, 347 U. S. 110, and *United States v. Allegheny County*, 322 U. S. 174. No partial payment-title vesting clause was involved in the first case. No issue comparable to the one at hand was presented in the second one since the disputed articles in that case had been completed, accepted and fully paid for and the Government had taken title thereto.

All opinions of Attorneys General and Government accounting officers, following *Ansonia,* blandly assume a broad principle on facts peculiar to *Ansonia.* These, but for one possible exception,[24] deal with specific end items, subjects of contracts there considered, to which title was to be taken in completed state or in a particular state of incompletion, upon making of partial payments. In the noted exception, that opinion holds only that Sec. 3648 would not prohibit a provision for taking of title to work in progress and material *in its then* condition upon making partial payments in proportionate amounts as it came into the contractor's plant and was paid for. The true character of title taken is not there considered.

The vital difference between our position and that of our opponents is that, in their opinion, it matters not what the subject matter of the contract is. They assume that title to materials or inventory on hand or later acquired, to be or intended to be processed into specific form acceptable to the Government, may be an equivalent, even though title thereto will (re)vest[25] if not delivered to and accepted, or incorporated into supplies delivered to and accepted by the Government. They rely on assumed opinions which never squarely considered the factual distinction to which we point.

Where analogy is made to a contract passing title to materials, the *Ansonia* opinion says, in effect, no—that is different; that is exactly what was attempted but failed in its purport in *Clarkson v. Stevens.* However, title passage to a ship at its several stages of construction, when inspected and paid for in proportion to the percentage of completion, is permitted because it deals with the subject of the contract.

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[24] 1 Comp. Gen. 143-146.

[25] See provision in the subcontracts at the very end of sub-paragraph (d) (R. 176, 205).

Tentative Nature of Title Indicates Security for Government's Investment

It is obvious that Appellee over-extended Ansonia as authority for the proposition that partial payment-title vesting clauses "such as here involved" are effective to vest *title and beneficial ownership* (Br. 64-65). That case only went so far as to uphold a claim of title by the Government as against creditors claiming under state lien laws. It cannot be interpreted as excluding title for security only, as the true character of the title taken.

We contend that materials, which are of a secondary nature, and which have not yet been processed, inspected and accepted, are no more than security upon the making of a partial payment and remain the property of the Appellee. If title to such materials vested in the Government, it was, under the construction of the contract which we claim it should receive, only a security or paper title, with appellee retaining beneficial ownership.

A salient guiding principle for construction of contracts for supplying labor and materials and making a chattel is enunciated by this Court in *Clarkson v. Stevens* (p. 515, 106 U. S.):

> "The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent, *open in every case*, to be determined upon terms of the contract, and the circumstances attending the transaction. I Pars. Ship. and Adm., 63. And such seems to us to be the true principle." (Emphasis supplied.)

Ansonia restates this rule in almost identical language (at p. 467, 218 U. S.).

Mere inclusion of such clauses in contracts or their language is not controlling. Under the rule of construction just quoted, not only the title vesting clause but "all sections of the contract must be read in the light of the purposes of the contracting parties" *(Amsonia, supra).*

When the subcontracts are so considered, we submit, the partial payment-title vesting clauses therein were effective only to transfer a security or paper title and beneficial ownership of the property at all times reposed in Appellee. Conclusive evidence to support such a construction is found throughout the contract provisions. (Our Br. 58-76.)

We stress throughout our brief contention that purpose of partial payment-title vesting clauses in contracts was to secure and protect the Government's investment which it advanced in the form of partial payments. This claim is fortified by statements in the Government's brief (Br. 39-40).[26] Appellee, on the other hand, gives emphasis to the need for complete and absolute control by the Government of essential war materials "at all times" as requiring inclusion of the clause in contracts. This claim is stripped of validity when we are reminded that not all contracts contained this clause, in which case control of materials purchased by the contractor for contract performance, was "at all times" in the contractor. Inclusion of the clause, even under our opponents' views of their effect, did not determine control of the materials until Appellee *requested* and *received* a partial payment. The same would be true after partial payments were liquidated. It was the investment of Government funds which changed the situation. It must be borne in mind that the contractor, not the Government, controls the decision and initiates the action for partial payment. Under our view, in either case, equitable ownership "at all times" was in Appellee, while the Government took a mere security or paper title to protect its finances when the partial payments were made. *American Motors Corp. v. City of Kenosha*, 274 Wis. 315, 80 N. W. (2d) 363 (Br. 58-76).

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[26] See also p. 6, *supra.*

It is interesting to note that Murray, for example, entered into the subcontract with Wright on April 19, 1951, requested a partial payment on October 30, 1951, and Wright made the payment on December 31, 1951, on the eve of assessment day and nine months after the date of the contract. In the long interim control of the materials was definitely not in the Government and the record in this case reveals no anxiety on its part in this respect.

To illustrate the practical application of the provision for liquidation of partial payments, we offered an example in our brief (p. 65) which Appellee challenges (Br. 68) as assuming a situation which does not and will not obtain in the normal course of events.

During the period from the execution of its letter subcontracts until assessment day, January 1, 1952, Appellee received from the prime contractors a total of $674,776 in partial payments (R. 258, 259-261). The agreed dollar valuation of personal property for which Appellee was assessed amounted to $2,043,670 [Stip. No. 1 (8), R. 84]. The fact that the materials on hand and work in process had then mounted to several times the value of sums received in partial payments as of assessment date is complete answer to the following statement in the Government's brief (p. 39):

> "The present case, we submit, is an actual and typical example of how the partial payment provision works."

Nothing in the record, then, supports the Government's claim that "there is every incentive for the contractor to hold his investment at the minimum by seeking partial payments to the full amount authorized" (Br. 39), or that "the contractor's investment in the property is relatively small" (Br. 42).

If we may be permitted to indulge in speculation as has the Government (at p. 39), it would be much more logical to assume that in the period from the earliest requests for partial payment on either subcontract, certain work in progress would be near delivery stage. Let us suppose acceptance and delivery were withheld until after assessment date and value of goods delivered was equal to the total of partial payments. The items delivered would result in liquidation of the outstanding partial payments. Title to all materials would vest again in Appellee by the terms of subdivision (d) of the partial-payment provisions. Such an example of title passing back and forth, dependent on existence of partial payments outstanding, emphasize the true security character of the title-passing provision.

The *American Motors* case, *supra*, stands as the only case, in all respects identical with the case at bar, which not only considered but interpreted the exact contractual provisions now before this Court (Appellants' Brief, 60, 62, 65, 68).

The *American Motors* case is supported by *United States v. Lennox Metal Manufacturing Co.*, 225 F. (2d) 302. Appellee replies that the *Lennox* case "does not turn upon the issue of whether a partial payment-title vesting clause creates absolute title or merely a security or lien title" (Br. 64). Such an analysis, however, ignores the plain and unambiguous opinion of the Court in that case, expressed as follows, at p. 317, *supra:*

> "The only other relief sought is, essentially, the enforcement of an equitable lien on defendants' property."

We do not contend that any language in the subcontracts is "inept" (Government Brief, 31). We disagree, however, that any single clause in and of itself is here controlling; further, the facts to which the language applies play a part in determining the nature of the title taken by the Government. Despite the fact that vesting language in *Ansonia* was almost identical with that in *Clarkson v. Stevens,* materially different facts, nevertheless, produced diametrically opposed results in these two cases.

Under the rule of construction applicable in this case, we contend that Murray was at all times the beneficial owner of the property in dispute here, while the Government held only a security or paper title thereto, to protect its financing of Appellee's subcontracts. Such beneficial ownership, we submit, leaves no basis for Appellee's claim for refund of the taxes here assessed.

V.

THESE NON-DISCRIMINATORY TAXES ARE VALID AS IMPOSING NO DIRECT BURDEN ON THE FEDERAL GOVERNMENT IN VIOLATION OF ITS IMPLIED CONSTITUTIONAL IMMUNITY.

(In reply to Government Question III and Appellee's Question IV)

The doctrine of implied Constitutional immunity of the Federal Government was established by this Court to preserve and protect the Union from hostile action by the States, either by taxation or regulation.

M'Culloch v. Maryland, 4 Wheat. 579.

It has been used, at times, however, merely to preserve and protect private persons from paying their share of the local tax burdens.

United States v. Allegheny County, 322 U. S. 174.

And at other times to permit Government officials to create immunity for private persons solely for the purpose of avoiding local taxes.

Kern-Limerick Inc. and United States v. Scurlock, 347 U. S. 110.

And once it was applied to protect a private person from paying a special assessment merely because the improvements for which the assessment was laid were installed earlier, when the Government owned the property.

Lee v. Osceola Imp. Dist., 268 U. S. 643.

And a private person and his property were once protected from enforcement of a tax lien, because the tax assessment was made while the Government had title obtained through foreclosure for Federal taxes.

> *Van Brocklin v. Tennessee,* 117 U. S. 151.

In many cases now overruled private persons have been protected from local taxation merely because of an indirect economic effect on the Government.

> *Graves v. Texas Co.,* 298 U. S. 393;
> *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218;
> *Rogers v. Graves,* 299 U. S. 401.

If the preservation and protection of the Government from hostile State action is the true concern of this Court under this doctrine and not the preservation and protection of private individuals or corporations, then it is incumbent on the Court to determine in each case if the particular tax involved (whether property, privilege, specific, excise or whatever) is actually or potentially destructive to any governmental powers or functions.

The Court in applying this test is not, then, concerned with the name or form or type of tax but is concerned with its substance and effect on the Government (Our Br. 111).

If the tax, then, is not levied upon a "means employed by the government for the execution of its powers" and does not "retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government" (*M'Culloch v. Maryland,* 4 Wheat. 579, 607, 609), the Government's supremacy is still preserved and protected (Our Br. 77-93; 113-116).

And if the tax is imposed upon and can be collected from a private person with the interests of the Government protected, the Government's supremacy is likewise preserved (Our Br. 94-110).

> *New Brunswick v. United States*, 276 U. S. 547;
> *James v. Dravo Contracting Co.*, 302 U. S. 134;
> *S. R. A. Inc. v. Minnesota*, 327 U. S. 558;
> *Union Pac. R. R. Peniston*, 85 U. S. 787.

The only local laws, tax or otherwise, which can really interfere with Government operations in the sense that they are a threat to the Government's supremacy, are discriminatory tax laws or regulations and those which could result in the stoppage of a federal activity if a tax or fee is not paid or a local regulation not complied with.

> *M'Culloch v. Maryland, supra;*
> *Mayo v. United States*, 319 U. S. 441.

The Government and appellee take the position on this question that this is an *ad valorem* property tax upon Government property; that *Van Brocklin v. Tennessee*, *Lee v. Osceola Imp. Dist.*, *Mayo v. United States*, *United States v. Allegheny County*, and *Kern-Limerick v. Scurlock, supra*, are applicable and controlling and that, therefore, the tax is invalid under the implied constitutional immunity of the federal Government.

The facts in this case i.e., that the tax is levied upon and charged to a private corporation which is the taxpayer, that the tax cannot be collected from the Government or its property and that the direct burden or incidence is, therefore, upon such private corporation and not upon a means of Government operation, nor, is it an interference with any Government function, are, to the Government and appellee, irrelevant.

Their argument discards all of the decisions of this Court where factual situations showing or failing to show interference with Government operations, were controlling, such as *M'Culloch v. Maryland, supra, Thomson v. Union Pac. R. R.*, 76 U. S. 792, *Union Pac. R. R. v. Peniston, supra, James v. Dravo Contracting Co., supra, Graves v. New York*, 306 U. S. 466, *Oklahoma Tax Com. v. Texas Co.*, 336 U. S. 342, *Alabama v. King & Boozer*, 314 U. S. 1, *Curry v. United States*, 314 U. S. 14, *Esso Standard Oil Co. v. Evans*, 345 U. S. 495, *S. R. A. Inc. v. Minnesota, supra, New Brunswick v. United States, supra, Land O'Lakes v. Wadena County*, 229 Minn. 103, affirmed by this Court 338 U. S. 897, citing 327 U. S. 558, and others.

The facts in the above cases having shown the direct burden or incidence of the taxes involved to be upon private persons, and, there being no interference with Government operations, those taxes were validated (except for *M'Culloch*, the facts in which having demonstrated an interference with Government operations, the tax was held invalid).

All of the above cases were interpreting and applying the doctrine of implied constitutional immunity of the federal Government together with its limitations as pronounced by Chief Justice Marshall in *M'Culloch*, 4 Wheat. 607, 609:

> "* * the states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government."
>
> "We find then on just theory a total failure of this original right to tax the means employed by the Government of the Union, for the execution of its powers."

And, continuing,

> "* * * this opinion does not deprive the states any resources which they originally possessed. does not extend to a tax laid upon the real proper of the bank within the state, nor to a tax impos on the interest which the citizens of Maryland m hold in this institution, in common with oth property of the same description throughout t state."
>
> "But this is a tax on the operations of the ba and is consequently, a tax on the operation of instrument employed by the government of t Union to carry its powers into execution. Such tax must be unconstitutional."

Simply put:

> "* * * The States may not levy taxes the dire effect of which shall be to hinder the exercise any powers which belong to the National Gover ment."
>
> *Union Pacific R. R. v. Peniston*, 85 U. S. at 791.

Our contention (Br. 113-116), unchallenged by the Go ernment and appellee, is that this is not a tax on th "means of government operations"; nor does it "retar impede, burden or in any manner control the operatio * * * of the government." It is not a tax "the dire effect of which hinders the exercise of any Governme powers."

Our brief (Br. 94-105) amply illustrates the person nature of the tax; that the tax is levied upon and charg to a private corporation under the Charter of Detroi that the private corporation alone is responsible for pa ment of the tax and that it alone can be sued for its co lection or its property seized for non-payment.

It is not denied that neither the Government nor its property (if this be in truth Government property) can ever be proceeded against for collection of the tax as we have shown (Br. 107).

Substance, Not Form or Name, of Tax Controls

The Government (Br. 44) urges the Court to look to substance rather than nomenclature and form to determine the *nature* and *effect* of this levy (although our opponents' arguments belie it). We first suggested this approach (Br. 111-115).

If substance be "that which underlies outward manifestations" *(Webster)* then the levy of this tax and its charge to Murray, under the Charter and by the assessment roll (Br. 94-106), plus the fact that both under the law and the decisions the tax can be collected by suit against Murray or levy upon its property (Our Br. id.) and that no enforcement can be or was made against the Government or its property (Our Br 107-110), is the substance of this taxation. The name given to it or its measurement by valuing property are, so far as nature and effect, merely name and form.

However, assuming for argument, that this is a property tax because it is *ad valorem*, i.e., according to the value of property, is there any reason why the opinions of this Court in so-called privilege tax cases, such as *Dravo, etc., supra*, should not be considered in the determination of this matter? We think they should.

The Government itself so suggests when it says:

> "Conceivably one might denominate any ordinary 'property' tax as a 'privilege tax'. A property interest is ordinarily regarded as an aggregation of rights and privileges possesed by the owner.

> So viewed, a so-called tax on property is virtually indistinguishable, as a conceptual matter, from a tax on the privilege of holding the property." (P. 22 Brief of Government in *U. S. A. and Borg-Warner v. City of Detroit*, No. 26, Supreme Court of United States, set for hearing with this case; *U. S. v. City of Detroit*, 345 Mich. 601).[27]

Accepting the Government's concept above, if a tax on the privilege of holding property *(Esso)* is "virtually indistinguishable" from a tax on property *(Allegheny)* then, if the direct burden and incidence of a property tax is upon a private person and there is no interference with Government operations or functions *(Dravo)*, why shouldn't the latter tax be equally valid. The fact that Government property is being used in both to measure the amount of tax the private person is required to pay changes nothing. Both are non-discriminatory and neither interferes with any Government operations.

Our contention (passing the questions of authority, Q. I, and ownership v. paper title, Q. II), is that the underlying principles of implied immunity as well as its limitations as laid down by *M'Culloch* and interpreted and reasserted in *Thomson, Peniston, Dravo, Graves v. New York, King-Boozer, Esso, S. R. A., supra, etc.*, admit of no distinction between types of taxes, if the taxes impose no direct burden on the Government, are non-discriminatory and constitute no impediment to Government functions.

The mere fact that the situs of property determines the tax jurisdiction (in certain instances) (Appellee's Br. 95) is not destructive of the character of the assessment as personal or *in rem*.

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[27] See reference by Government in its Brief in this case to Borg-Warner Brief (Footnote p. 43).

Many privilege and excise taxes are levied by the community having jurisdiction over the property used as the tax base.

And under the Detroit Charter personal property may be outside the city and still be assessed to and the tax collected from the company owning it doing business in Detroit, the jurisdiction of the person being therefore determinative of the tax jurisdiction in certain instances. *Annis Furs, Inc., v. City of Detroit,* 336 Mich. 527, 531.

In all its manifestations, the levy (or charge) of this tax, the liability for its payment and the enforcement are all solely against Murray, appellee, a private corporation. The Government or its property is as free of harm or interference (either actual or potential) as it was in *Dravo, Esso, Graves v. New York, King-Boozer, S. R. A., New Brunswick* etc. *supra.*

A tax otherwise valid is not vitiated by its measurement in part or whole by the value of Government property, *S. R. A., New Brunswick, supra;* or by the value of immune property. *Plummer v. Coles,* 173 U. S. 115, *Home Insurance Co. v. New York,* 134 U. S. 594, *Educational Films Corp. v. Ward,* 282 U. S. 379, *United States v. City of Detroit,* 345 Mich. 601, 611 (United States Supreme Court No. 26. Appeal to be heard following this case).

A tax may legally be levied against and collected from a person in possession of property measured by that property's value, in Michigan under the General Tax Law and the City Charter (Our Br. 102-3). It would be no more valid if it were designated as a tax on the privilege of using the property.

If nomenclature is not the distinguishing mark in deciding the validity of a tax within the immunity doctrine, then there is no difference in the two, because there is no difference in substance. The mere fact that Government property in the taxpayer's possession or used by him is the measure of the tax in each instance, still leaves them indistinguishable as tax laws under immunity principles.

Obviously a tax levied on a private person *for the privilege of using* (or storing, as in *Esso*) Government property and one levied against a private person *because he possesses* Government property which he is using (or storing) are different only in name, if the tax he has to pay is the same. They can both by simple calculation produce the same amount of taxes, as the tax in each instance may be measured by the value or quantity of the property possessed, used or stored and can, arithmetically, be made to produce the same result. To say that one is valid under the principles of constitutional immunity (the preservation and protection of the Government's supremacy) and the other is invalid, would "prove a triumph for semanticism."[28]

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[28] *"The Remnant of Intergovernmental Tax Immunities"* by Thomas Reed Powell, 58 *Harvard Law Review*, at 784-785.

The author demonstrates how the mere change in form or wording of the Pennsylvania Statute involved in *Allegheny* might accomplish a change in the Court's opinion without changing in any respect the effect (or lack of effect) on the Government.

> "Though there was agreement as to what actually happened under the Pennsylvania system, the majority did not agree that the state law really put the tax on the private land. Mr. Justice Jackson quotes from the statute what he calls its basic provision to the effect that 'The following *subjects and property* shall * * * be valued and assessed, *and subject to taxation.*' He reports no statutory reference to machinery, but notes the procedure of the assessors in learning its value from a machinery expert. It is not clear whether the statutory reference to property is relied on as pointing to the conclusion or as propping it up or both. The particular words quoted refer to property and not to persons. Yet if the statute had read that 'there is hereby imposed on each owner of real estate a tax on the value thereof and on the value of all chattels thereon, provided no lien for non-payment shall attach to any chattels not the property of

(Continued on next page)

Analysis and Comparison of Government's and Appellee's Case Authorities with Appellants' Authorities

(a) United States v. Allegheny

The Court in *Allegheny* said that the real property tax law there under consideration was a "form of taxation not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing". We say and support it by the words of our law as well as the decisions of our Court (Br. 98-103) that the form of personal property taxation under our law is regarded primarily as a form of personal taxation rather than a tax against the property as a thing. It should be so regarded by this Court under the implied immunity doctrine.

Even if it be regarded as a tax *in rem* rather than *in personam*, under these circumstances the direct burden, the incidence and the enforcement are all imposed upon

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(Continued from preceding page)

> the owner of the real estate,' the practical impact of the Pennsylvania law would have been unchanged. If such alternative phrasing should lead to a difference of decision, it would prove a triumph for semanticism."

It would also prove a triumph for the proponents of the correct interpretation of the doctrine of immunity (not merely local tax bodies) if the Court, at the same time it was approving such a statute (or this tax law) were to say:

> "Allegheny is out of harmony with correct principles, and, though it may be distinguished, is overruled."

In *Esso Standard Oil v. Evans, supra*, although the Court distinguished Allegheny, it was a distinction without a difference and actually nullified Allegheny in principle. Can it make any difference to the preservation of the Government's supremacy or interference with its operations if a tax paid by a private person is measured by the "worth" or the "quantity" of Government property as the Court there said in distinguishing Allegheny from Esso.

a private person and are not, even as they may not, be directed against the Government. (*United States v. Alabama*, 313 U. S. 273, *S. R. A. v. Minnesota*, *supra*.)

The cases cited by the Government and appellee, *Van Brocklin*, *Lee v. Osceola*, *Allegheny*, *Kern-Limerick*, *Mayo*, *supra*, are distinguished on the facts and laws from this case and should be limited to their own facts. They are not applicable here.

The real property tax in *Allegheny*, was, as the majority found, on Government property *(in rem)*. The fact that a private person bore the brunt of the tax was considered immaterial. Justices Frankfurter, Douglas and Black, dissenting, were of opinion that, on the precedent of *Dravo* (which turned on the fact that the tax therein was not a direct burden on or interference with the Government) the tax should be validated.

The significance of *Dravo* and *Graves v. New York*, *Oklahoma Tax Comm. v. Texas Co.*, *S. R. A.*, and *New Brunswick*, *supra* and the like decisions of earlier days, *Thomson* and *Peniston* (Our Br. 81-93) is the determination of the Court to limit the implied immunity of the Government to situations where Governmental functions are directly affected or interfered with and not to extend immunity to private persons. On principle, *Allegheny* cannot be distinguished from these cases, although there may be technical differences in the facts.

(b) Van Brocklin v. Tennessee

In *Van Brocklin* the tax was laid directly upon Government property. The tax was not levied against or even charged to a private person, although when the lien was enforced, a private person had acquired the property.

The case is not in point, as the law there involved was a real property tax law with the property the subject and object of the tax and the Government as owner liable for payment of the tax directly (there being no intervening private person or taxpayer when the tax was levied) and the only means of collection, we assume, being foreclosure of the property taxed.

It is, therefore necessary under that decision to determine whether a tax is upon a *means* of Government operations and whether it would *interfere* with such operations.

This Court should, therefore, be concerned with whether or not the materials or work in process herein involved are actually "means" of Government operations and whether this tax would interfere with such operations.

If they are not such "means" and there is no interference, as we have shown (Br. 113-119), then the tax should be valid under *Van Brocklin*, as well as *Dravo*, *King-Boozer*, etc. *supra*.

The decision in *Van Brocklin* was based on authorities such as *Collector v. Day*, 11 Wall. 113, *Dobbins v. Erie County*, 16 Peters 435, now reversed. (See *Graves v. New York*, 306 U. S. 466, 486, 492).

See discussion above of these now obsolete cases in *Van Brocklin* at pp. 177-178 of 117 U. S.

As Justice Frankfurter said in his concurrence in *Graves v. New York*, *supra*, at 491, 492 of 306 U. S.:

> "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exe-

> gesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of the constitutionality is the Constitution itself and not what we have said about it. Neither *Dobbins v. Erie County*, 16 Pet. 435, 10 L. Ed. 1022, and its offspring, nor *Collector v. Day (Huffington v. Day)* 11 Wall. 113, 20 L. ed. 122, *supra*, and its (offspring) can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an inter-dependent doctrine, both should be, as I assume them to be, overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day."

Van Brocklin is an "offspring" of *Dobbins* and *Collector v. Day* and it is at least doubtful if it can "stand appeal to the Constitution and its historic purposes" more so than its parents.

Even the principles of *M'Culloch* stated at length by Justice Gray in the *Van Brocklin* opinion, 117 U. S. at 155-156 as authority, hardly admit of the conclusion reached by the Court:

> "All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are upon the soundest principles, exempt from taxation. *The sovereignty of a state* extends to everything which exists by its own authority or is introduced by its permission, but *does not extend to those means which are employed by Congress to carry into execution the powers conferred on that body by the People of the United States. The attempt to use the taxing power of the state on the means em-*

> *ployed by the government* of the Union, in pursuance of the Constitution, is itself, an abuse. * * *" (Italics ours.)

It may be, as the Court said, that the property involved in that case, being acquired by the Government for nonpayment of taxes, was a means employed under the constitutional power of Congress to levy and collect taxes, but it ceased to be such means when those taxes were paid by redemption or sale before the levy.

The argument in support of the tax in *Dobbins* was similar in many respects to the argument we here urge that this tax is by law and application a personal levy and charge. The Court rejected this claim, saying at p. 445 of 16 Pet. (U. S.):

> "It will not do to say, as it was said in argument, that though the language of the act may import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and, then, *that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.*
>
> The first answer to be given to these suggestions, is that the tax is to be levied upon a valuation of the income of the office." (Italics ours.)

If the personal nature of this tax be rejected, as it as above by the Court in *Dobbins*, then the rule of *Dob- ins* will be resurrected in spite of its internment by *Graves* . *New York*, *supra*.

Enforcement of a lien was the subject of the *Van Brock- n* case. There was no question, as here, as to the lia- lity of a private person for payment of a tax assessed against such private person even though Government property might be used to measure such tax. The tax being directed against Government property and the Government, as owner, being the taxpayer (no private person being responsible for its payment or collectible at the time of assessment and levy) the levy of the tax was held void and therefore there was nothing to support the lien and its foreclosure.

If, as the Court said in *Van Brocklin*, the Government was holding title as security for payment of a tax, then how does it differ in principle or practice from the facts in *S. R. A.* and *New Brunswick* where the Government held title as security for the payment of the balance on a contract of sale? In only one respect,—a private person could be taxed and collected from in *S. R. A.*, but not in *Van Brocklin* at the time the tax was levied.

If law is based on common sense and the law of implied federal immunity is predicated upon possible harm to the Government of a tax upon its property or instrumentalities, then the decisions in *S. R. A.* and *New Brunswick* must be accepted as in accord with the fundamental basis of the doctrine of implied immunity and its limitations. *Van Brocklin*, *Lee v. Osceola*, and *Allegheny* must be open to serious question even as *Collector v. Day* and *Dobbins* were. They can only be justified on the ground of an economic—or remote effect on the Government,—certainly not upon its need of preservation or protection.

(c) Lee v. Osceola Imp. Dist.

Lee v. Osceola Imp. Dist., 286 U. S. 643, was a case involving a reassessment of lands for the benefits of an improvement made while the land was owned by the Government, the lands at the time of the reassessment being privately owned.

Neither the incidence of this assessment nor its direct burden were on the United States or its property. The only possible effect on the Government was economic, i.e. if the possibility of an assessment being later levied would have to be considered on the sale of the property then the Government might have to take less for it than otherwise. Conversely, however, it could be assumed that the Government would receive more for the property because of the improvement and if the price was reduced to compensate for such a possible assessment, then the Government lost nothing.

Either *S. R. A.* and *New Brunswick* are good law and this is bad or vice versa. Certainly, if, as the Court said in *Lee* the assessment was invalid because it constituted an encumbrance on Government property (retroactively—how or in what manner the Court does not explain), then the assessments in *S. R. A.* and *New Brunswick* should have been invalid as encumbrances, the Government still having title to the property when they were levied.

Equally, if the effect of the tax on the Government is merely economic, *Dravo, Graves*, etc. have since ruled that out as a cause of invalidity.

We submit that *Lee* must be considered as no longer sound, if it ever was, under the correct principles and interpretation of the immunity doctrine. Under the facts, it is not applicable.

(d) United States v. Mayo

In *Mayo*, State fertilizer inspection fees were "laid directly upon the Government", the Government being the owner of the fertilizer and the State threatened to stop the agents of the Government from distributing the fertilizer until the fee (for inspection) was paid.

The basis of the decision in *Mayo* was interference with the distribution by United States agents of fertilizer belonging to the Government. The State of Florida was attempting to enforce an act, as stated by the Court below:

> "regulating the fertilizer industry and not legislation for raising revenue and the fees required are only one aspect of a total scheme of regulation which cannot be validly applied to the United States, its property or transactions. The property of the United States is immune from seizure even to collect a valid tax and certainly this federal property is immune from State seizure even to collect a valid fee." *United States v. Mayo*, 47 Fed. 552, 557.

The case was an action by the United States to enjoin interference with the distribution of fertilizer by United States agents.

That case is a concrete example of how enforcement of a regulatory law directly against the Government or its agents constitutes an interference with Government operations. How does that decision apply to the facts here where neither the assessment nor its collection interfere with Government operations? This is not a regulatory law, enforcement of which stops a Governmental function.

This Court upheld the decision of the lower Court there, saying that the inspection fees were laid directly upon the

United States and that they were money exactions required before the United States could execute a function of Government.

The Court distinguished *King-Boozer, Graves v. New York* and *Penn. Dairies v. Milk Control Commission*, 318 U. S. 261, saying that the exactions therein directly affected persons who were acting for themselves and not for the United States. Similarly, Murray is here acting for itself and not the United States, its contract with the United States not making it a Government agent or instrumentality, *Dravo.*

(c) S. R. A., Inc. v. Minnesota
New Brunswick v. United States

S. R. A. and *New Brunswick* stand for the principle of preservation of the sovereign's supremacy and *M'Culloch's* doctrine of implied immunity stemming therefrom and at the same time preserve the sovereign state rights of taxation by holding, in effect, that where a private person is responsible for payment of a tax and the tax may be collected by action against him or his interests, leaving the Government's interests in the property unimpaired, such a tax is valid.

So long as the Government instrumentality "holds title to lots *solely for its use and benefit* they are not subject to local taxation." *New Brunswick v. United States, supra*, (Br. 109), citing *Clallam County v. United States*, 263 U. S. 341, 344. *Van Brocklin* might be justified under *Clallam* and *New Brunswick* because at the time the tax was levied the Government was holding title to the property "for its sole use and benefit."

The converse of that, obviously, is that lots (or other property) title to which is held by a Government instrumentality not "solely for its use and benefit" are subject to taxation when, as these cases hold, the Government's interest is protected and the impact of the tax and its collection is on a private person. The assessments in *S. R. A.* and *New Brunswick* were upon the entire lots, including not only the interests of the purchasers, as equitable owners, but the interest of the Government instrumentality.

There was no separation of interests of individual and Government in the assessments (as the Court in *Allegheny* said was necessary to validate a property tax, 322 U. S. 187).

The separation of the Government's and the individual's interests in those cases was in the enforcement and in making the tax and levy subject to the Government's prior rights, as we have done here (Br. 107-110).

In *New Brunswick* the Court carefully pointed all this out (Br. 109) and we fail to see any difference in principle or comparable fact and law between the facts and law here before the Court and those in that case. Taxing a purchaser of property as equitable owner and taxing a person in possession because of that possession is, under the laws of taxation and implied Government immunity, no different, if, in both cases, the protection of the Government's interest is adequate.

As this Court has said in *Northern Pac. R. R. v. Myers*, 172 U. S. 589, 598-599, in reference to many earlier land patent cases "Embarrassment to the title of the United States by a sale of the land for taxes seems to have been the concern and basis of those cases." Similarly this was the Court's concern in *S. R. A* and *New Brunswick*.

And as Judge Cooley, in *Cooley on Taxation*, has said, there is nothing hostile in the assessment for taxes. It is only the levy or seizure of the property that is hostile to the citizen (or the Government) (Our Br. 98).

And we need look no further than *United States v. Alabama,* 313 U. S. 273 (Our Br. 108) to find complete protection of the Government from any hostile procedure for collection of a tax regardless of whether such tax is levied directly upon Government property or upon a private person. And *S. R. A.* and *New Brunswick* reaffirm that decision with the added protection of the wording of the assessment roll in *S. R. A.* that the assessment is subject to the Government's rights.

The Attorney General of the United States in 1806, in an opinion written to the Secretary of State—before *M'Culloch*—after saying that he thought the Government *ought not admit* of the exercise of the power of local taxation of Government property, said "it would be harmless, however, because it could not be enforced." (See 117 U. S. 163.) Similarly, that is what this Court held in *United States v. Alabama, supra,* holding a tax and lien valid but the lien unenforceable against Government property (313 U. S. 281-282).

The logic of this approach comes from *M'Culloch* as we have heretofore shown.

If this Court is concerned with the effect of a tax on the Government's functions, as it was in *M'Culloch, Dravo, Graves v. New York, S. R. A., New Brunswick, et al., supra,* and not with absolutes, as in *Allegheny,* then the law and facts here present indicate a valid tax.

If the respective orbits of the powers of federal and state government, both as to taxation and government functions, are kept in separate spheres so that there can be no destruction of or interference with one or the other, then Chief Justice Marshall's original concept is maintained. And if a private person is between the two to intercept any action one against the other, then there can be no interference and should be no immunity.

To assess a tax directly against Government property or functions without a private person being responsible for its payment and collectible therefor would be a futile gesture inasmuch as it could not be collected.

But where a private person is made responsible for its payment and it may be collected from him or his property, the Government is not interfered with, nor can it be, but the local government can collect its tax. If the Federal Government be hurt in pocket because it assumes the tax voluntarily by contract or because the tax is included in the price of the article it purchases, that is *damnum absque injuria* applied to the field of implied immunity *(Dravo)*.

CONCLUSION

Wherefore Appellants and Petitioners City of Detroit, a Michigan Municipal Corporation and County of Wayne, a Michigan Constitutional Body Corporate, join in requesting relief at the hands of this Court as appears in their Brief filed with the Court.

Respectfully submitted,

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Nos.

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36

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a Delaware Corporation, Appellee, and
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THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

APPELLANTS' BRIEF

(For List of Counsel see inside front cover)

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

No. 401 Filed September 10, 1956
No. 401—Jurisdiction Postponed January 14, 1957
No. 563 Petition for Certiorari Filed November 13, 1956
No. 563—Certiorari Granted January 14, 1957

INDEX

Page

Opinions below 2

Jurisdiction 3

Statutes involved 7

Questions presented 8

Statement of case........................... 9

Nature of assessment and tax.................. 9

Form and provisions of contracts............. 11

Analysis of partial payment provisions........ 12

Proceedings in District Court................. 15

Stipulated facts 15

Summary of argument........................... 22

Argument

I. Were provisions for transfer of title to United States of materials in possession of an independent sub-contractor unauthorized under Federal law?

The Courts below answered "No."
Appellants contend the answer should be "Yes" 28

A. Congressional view of Advance-Partial payments 33

B. Congressional intent in considering H. R. 1366 (Armed Services Procurement Act) 37

C. Authority must be found in statute...... 46

D. Allegheny not controlling here.......... 47

Page

II. If inclusion of title transfer provisions was authorized, did related contract terms and the undisputed course of conduct, nevertheless, establish ownership in appellee and paper title in the Government?

The lower courts answered "No." Appellants contend the answer should be "Yes" 52

A. Purpose of Partial payment-title vesting clauses in Government contract.......... 54

B. The Court's approach to tax questions... 55

C. Basic principles of ownership.......... 57

D. Provisions of the contract do not establish ownership in the Government....... 58

E. The conduct of the parties was inconsistent with the claim of beneficial title in the Government 69

F. Army regulations treat payments, whether partial, progress or advance, as method of financing 72

III. Are these state and local tax laws and nondiscriminatory taxes levied thereunder valid as imposing no direct burden on the Federal Government in violation of its implied constitutional immunity?

The Courts below answered "No." Appellants contend the answer should be "Yes" 77

A. Doctrine of Implied constitutional immunity 77

B. Nature and impact of the tax.......... 94

C. Liability or responsibility for payment of the tax 102

Page

D. Substance and effect of this tax do not constitute interference with means of operations of Government.............. 113

E. Allegheny compared and distinguished.. 120

Conclusion 130

Appendix 1a

AUTHORITIES CITED

Decisions

Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607.................................. 46

Alabama, State of v. King and Boozer, 314 U. S. 1 44, 45, 85, 110, 123, 124

American Motors Corp. and United States, Intervenor, v. City of Kenosha, 274 Wis. 315, 80 N. W. 2d 363............................60, 62, 65, 68

Bank of Louisville v. Kentucky, 76 U. S. 701...... 82, 83

Benton v. Commissioner of Internal Revenue, 197 Fed. 2d 745, 754.............................. 57

Bradford Electric Light Co. v. Clapper, 284 U. S. 221 7

Carstairs v. Cochran, 193 U. S. 11............... 103

City of Detroit v. Gray, 314 Mich. 516, 22 N .W. 2d 771 102

City of Detroit v. Stafford, 320 Mich. 6, 30 N. W. 2nd 410 .... 102, 103

Clallam County v. United States, 263 U. S. 341..... 110

Commissioners v. Court Holding Co., 324 U. S. 331 56, 57

Continental Casualty Co. v. United States, 113 F. 2d 284 46

Corliss v. Bowers, 281 U. S. 376................. 56

Page

Dahnke-Walker Milling Co. v Bondurant, 257 U. S. 282 5
Detroit Shipbuilding Company v. City of Detroit, 228 Mich. 145, 199 N. W. 645, 135 A. L. R. 597 102
Detroit Trust Co. v. Detroit, 269 Mich. 81, 256 N. W. 811 .... 101, 103
Dunitz v. Pick Co., 241 Mich. 55, 216 N. W. 382.. 101
Esso Standard Oil v. Evans, 345 U. S. 495...... 85, 124
Federal Land Bank v. Bismarck, 314 U. S. 95.... 106, 123
Federal Trade Commission v. Raladam Co., 283 U. S. 643.................... 47
Flanigan v. Police Jury, 82 So. 722.............. 97
Gillespie v. Oklahoma, 257 U. S. 501............ 86
Graves v. New York, 306 U. S. 466....85, 90, 110, 117, 124
Graves v. Texas Co., 298 U. S. 393............. 86
Griffiths v. Commissioner, 308 U. S. 355........ 75
Helvering v. F. R. Lazarus and Co., 308 U. S. 252 55
Helvering v. Mountain Producers, 303 U. S. 376 85, 90, 93, 124
Indian Motorcycle Co. v. United States, 283 U. S. 570 85
Kelly v. Herrall, 20 Fed. 364.................. 98
Kennedy v. Mason, 334 U. S. 249................ 4
James v. Dravo Contracting Company, 302 U. S. 134, 85, 87, 91, 110, 124
Kern-Limerick, Inc. and United States of America v. Scurlock, 347 U. S. 110............4, 41, 43, 44, 52, 93, 112, 117
Land O'Lakes Dairy Co. v. Wadena County, 229 Minn. 103, 39 N. W. 2d 164.................. 103
Lane County v. Oregon, 74 U. S. 101............ 83
Lionberger v. Rowse, 76 U. S. 721.............. 82
Longest v. Langford, 274 U. S. 499.............. 4
M'Culloch v. Maryland, 4 Wheat. 579......77, 91, 120, 124

Page

MacEvoy Company, Clifford F. v. United States of America, 322 U. S. 102 29
Madden v Kentucky, 309 U. S. 83 6
Manhattan General Equipment Company v. Commissioner of Internal Revenue, 297 U. S. 129 47
Metcalf v. Mitchell, 269 U. S. 523 .... 85, 89, 91
Mills v. Scott, 99 U. S. 25 30
New Brunswick v. United States, 276 U. S. 547, 105, 108, 109, 110, 124
New York v. Latrobe, 279 U. S. 421 6
Northern National Bank v. Northern Bank, 244 Minn. 202, 70 N. W. 2d 118 104
Oklahoma Tax Comm. v. Texas Co., 336 U. S. 342 85, 92, 104, 124, 128
Oklahoma Tax Comm. v. U. S., 319 U. S. 598 124
Offutt Housing Co. v. Sarpy, 351 U. S. 252 ..... 53, 55, 71, 111, 114
Offutt Housing Co. v. Sarpy, 160 Neb. 320, 70 N. W. 2d 382 56
Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169 6
Panhandle Oil Co. v. Mississippi, 277 U. S. 218 ... 86, 92
Penn Dairies v. Milk Control Com., 318 U. S. 261 47
Petition of Edward Hines Lumber Company, 196 Oregon 420, 248 P. 2d 720 107
Petition of S. R. A., Inc., 213 Minn. 487, 7 N. W. 2d 487 108
Priebe & Sons, Inc. v. United States, 332 U. S. 407 47
Reynolds Aluminum Co. v. Multnomah County, 206 Oregon 602 287 P. 2d 921 .... 104, 107
Rogers v. Graves, 299 U. S. 401 86
Roth v. Delano, 338 U. S. 226 .... 3, 6
S. R. A., Inc. v. Minnesota, 327 U. S. 558 ... 49, 55, 85, 104, 108, 123, 124

Page

Schaefer v. Woodmere Cemetery, 256 Mich. 332, 239 N. W. 300 56
Smith v. Davis, 323 U. S. 111 85
Thomson v. Union Pacific R. R., 76 U. S. 792 80, 81, 88, 124
Towne v. Eisner, 245 U. S. 417, 425 72
Union Pacific R. R. v. Peniston, 85 U. S. 787 80, 84, 88, 124
United States v. Alabama, 313 U. S. 273 .....105, 107, 108
United States v. Allegheny County, 322 U. S. 174 23, 31, 47, 50, 93, 96, 117, 120, 121, 124
United States v. Ansonia Brass & Copper Co., 218 U. S. 452 59
United States v. City and County of San Francisco, 310 U. S. 16 47
United States v. Forbes, 36 F. Supp. 131 47
United States v. Foster, 131 F. 2d 3 96
United States v. Jones, 176 F. 2d 278 47
United States v. Lennox Metal Mfg. Co., 225 Fed. 2d. 302 ....65, 66, 67, 76, 125
United States v. Mott, 37 F. 2d 860 47
United States v. State of Arizona, 295 U. S. 174 30
Utah Power & Light Co. v. United States 47
Watson v. Employers Liability Assurance Corp., 348 U. S. 66 .... 3, 6
West Michigan Lumber Co. v. James Dean, 73 Mich. 459, 41 N. W. 503 99
West v. Oklahoma Tax Comm., 334 U. S. 717 105
Willcuts v. Bunn, 282 U. S. 216 .... 85, 87
Wisconsin Central Railroad Co. v. Price County, 133 U. S. 496 56

Federal Statutes

	Page
Armed Services Procurement Act of 1947, Ch. 3, C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.	7, 12, 22, 29, 34, 42, 46, 52
Contract Settlement Act of 1944 (78th Congress, 2d Session, Public Law 395, Ch. 358), 41 U. S. C. A. 101	42, 73
First War Powers Act, c. 593, 55 Stat. 838, Sec. 201, 50 U. S. C. 611	34
R. S. Section 3648, amended Aug. 2, 1946, c. 744, 60 Stat. 809, 31 U. S. C. A. Sec. 529	7, 22, 28, 30, 52
Act of Aug. 22, 1911, c. 42, 37 Stat. 32, 34 U. S. C. 582	33
34 U. S. C. A. Sec. 582.	33, 34
Act of Oct. 6, 1917, c. 79, 40 Stat. 383, Sec. 5 (note to 31 U. S. C. 529)	33
Act of June 28, 1940, c. 440, 54 Stat. 676, 50 U. S. C. 1151	7, 34
Act of Dec. 18, 1941, c. 593, Title II, 201, 55 Stat. 838, 50 U. S. C. 611	7, 22, 34, 36
Act of June 30, 1949, c. 288, Title III, Sec. 305, 63 Stat. 396, 41 U. S. C. 255	36

Regulations

Army Procurement Regulations, 1947, 12 Federal Register 7693	8, 54
1 CCH Government Contracts Rep., §8017 (No. 7800-1)	72
1 A CCH Government Contracts Rep., §29.753	74
2 CCH Government Contracts Rep., §40.036	73

Local Statutes, Etc.

Compiled Laws, State of Michigan (1948), Sec. 211.1, 211.10, 211.11, 211.40 .... 8, 10, 95
Local Acts (1943), State of Michigan, Act No. 6, Sec. (1), (2), (4) 8, 10
Charter of the City of Detroit, 1918 (1952 Ed.), Chapter II, Title VI:
  Sec. 1 .... 8, 9, 10, 50, 95, 96
  Sec. 2 .... 8, 101
  Sec. 6 8
  Sec. 7 .... 8, 50, 95, 96, 98, 99, 106

Charter of the City of Detroit, 1918 (1952 Ed.), Chapter IV, Title VI:
  Sec. 1 .... 8, 50, 95, 96, 102, 103
  Sec. 26 .... 8, 50, 103
  Sec. 27 .... 8, 50

Congressional Hearings and Other References

2 United States Code, Congressional Service, 80th Congress, Second Session, 1948, Vol. 2, p. 1064 32
Hearings before the Committee on Governmental Operations, United States Senate, 84th Congress, 1st Session, July 24, 1955, Appendix II, p. 200 110
House Armed Services Committee Hearings, Vol. 38, Library of Congress, Vol. 1, pp. 434, 447, 576, 577, 578, 608, 609, 616 .... 38, 39, 40, 41
No. 911, Senate Misc. Reports IV, U. S. 10546 ...... 35, 54
House Report 1507 35
House Report 109, p. 5, 80th Congress, U. S. 11118 .. 32, 37

Miscellaneous

Page

29 Amer. Jurisprudence, p. 47 60
42 Amer. Jurisprudence, p. 215 .... 58, 61
Brown on Personal Property, Sec. 5, pp. 6, 7 57
Cooley on Taxation, Vol. 1, 4th Ed., Sec. 24 97
Cooley on Taxation, Vol. 3, 4th Ed., Sec. 1044 97
Letter Order for Supplies (§1307) W. D. Contract Form No. 7 .... Appendix 18a
Opinion Attorney General of Michigan, 1928-30, p. 176 .... 100, 103
Opinion, Attorney General of Michigan, 1940, p. 524 101
Personal Property Assessment Roll, City of Detroit Appendix 29a

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

APPELLANTS' BRIEF

[Figures in parentheses refer to pages of the Transcript of Record (Joint Appendix) unless otherwise indicated]

These consolidated cases have been brought up by defendants-appellants' notice of appeal, July 25, 1956, and filing of jurisdictional statement, September 10, 1956, and also by petition for writ of certiorari, filed November 13, 1956.[1]

The Court's order of January 14, 1957, in No. 401 (October Term, 1956) states that consideration of question of jurisdiction was postponed to hearing of these cases on merits. On the same date, appellants' petition for certiorari was granted in No. 563 of the same term. Although bearing two separate docket numbers, they are one and the same case. The question of jurisdiction is discussed at the outset, *infra* pp. 3-7.

OPINIONS BELOW

The opinion of United States Court of Appeals, Sixth Circuit, appears in 234 F. 2d 380. Copies of judgment entered June 16, 1956, and opinion of the Court below have been added to joint appendix (271-277) prepared for that Court and filed herein pursuant to Court Rule 36 (3). The opinion of Hon. Thomas P. Thornton, District Judge for Eastern District of Michigan, is reported in 132 F. Supp. 899 (112-122).

---

[1] After extension of time granted September 15, 1956 to keep open alternate avenue of review in the event appeal taken might be deemed ineffectual, deferment of action by the Court on queston of jurisdiction caused appellants to file petition for review by certiorari prior to final deadline.

JURISDICTION

(i) These actions were brought and original jurisdiction in the District Court invoked by plaintiff and appellee, Murray, under 28 United States Code, Sections 1331 and 1332, respectively.

(ii) Consolidated herein are two suits brought against Detroit for recovery of first and second half installments of the disputed 1952 City personal property tax together with a third action against the County of Wayne all based on a single assessment and involving the same questions and claim of tax immunity of an independent subcontractor based on contract provisions covering production of parts for use in aircraft contracted to be delivered by intermediary prime contractors to the United States Air Force. They were disposed of together by judgment of the United States Court of Appeals, Sixth Circuit, on June 16, 1956, in Cause No. 12678. Notice of Appeal was filed in that Court in each of the cases on July 25, 1956.[2]

(iii) Jurisdiction of the Supreme Court to review the latter judgment by direct appeal is conferred by C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (2)); C. 646, 62 Stat. 961, as amended by C. 139, §106, 63 Stat. 104 (28 U. S. C. A. 2101(c)).

(iv) The following decisions sustain the jurisdiction of the Supreme Court to review said judgment on direct appeal in this case:

Watson v. Employers Liability Assurance Corporation, 348 U. S. 66.

Roth v. Delano, 338 U. S. 226.

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[2] The issues raised being identical, this Brief is intended to apply to all three cases in conformance with the Court's Order of Consolidation.

Kennedy v. Mason, 334 U. S. 249.
Longest v. Langford, 274 U. S. 499.

At the very outset, questions of invalidity of State statutes and local charter provisions were raised in the trial court in complaints filed by appellee.

Paragraph seven of said complaints (R. 6) claims the assessment is made upon or with respect to property constitutionally immune. Paragraph eight claims Michigan laws and local (charter provisions) ordinances purporting to authorize such assessment are in violation of and repugnant to the Constitution of the United States. Paragraph nine claims such laws and ordinances have been applied in a manner which renders them invalid under the Constitution of the United States (R. 6).[3]

Such allegations provide the framework on which all issues discussed in briefs and opinions in this case depend. Even though no specific reference is made to them in the Court of Appeals' opinion, there is passing mention that the United States claimed the assessment was upon its property and therefore invalid under the Federal Constitution.

However, affirmance of judgments in the Courts below holding these assessments invalid must have identical legal effect as the final decision in *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. Opinion of the Court of Appeals herein (R. 275-6), 234 F. 2d 380, 383, characterized the decision in *Kern-Limerick* as follows:

> "The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two trac-

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[3] The Murray Complaint was adopted by the United States (R. 76, II).

> tors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department * * *."

By analogy, application of the same language to the facts at hand produces the following inevitable result:

The Michigan general property tax law and local charter provisions were held unconstitutional as applied to transactions where private contractors were in possession of personal property on hand for processing to be incorporated into aircraft being manufactured for the United States under a cost-plus-fixed-fee prime contract containing partial-payment, title passage clauses on which partial payments had been made prior to effective tax date.

The Courts below thus held Michigan Statutes and local charter provisions, as applied to facts before them, unlawfully interfered with the Federal Constitution. The problem is one of alleged clash between State and federal laws. This is sufficient for appellate jurisdiction of this Court under Section 1254 (2) 28 U. S. C.

Unlawful interference is a holding of invalidity because of repugnancy. Any other view would permit a Court of Appeals to deprive this Court of appellate jurisdiction, when in fact holding a state statute invalid because of repugnancy to a federal law—merely by phrasing the opinion in such a way as not to use the exact words of Section 1254 (2).

> "A statute may be invalid as applied to one state of facts, and yet valid as applied to another."
>
> *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289.

This Court acknowledged jurisdiction by appeal in *Watson v. Employer's Assurance Corporation, supra,* stating at pp. 69-70 (U. S.):

> "With emphasis on the due process contention, the District Court dismissed the case, holding both statutory provisions unconstitutional as to policies written and delivered outside the State of Louisiana, 107 F. Supp. 494. The Court of Appeals agreed with the District Court and affirmed the dismissal, 202 F. 2nd 407. Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal."

Further this Court took jurisdiction where the Court of Appeals held a state statute ineffective as an unlawful interference with the liquidation of a national bank in *Roth v. Delano, supra,* and has accepted for review without commenting thereon similar determinations striking down official acts taken pursuant to State laws as repugnant to the Federal Constitution or laws (*New York v. Latrobe*, 279 U. S. 421; *Madden v. Kentucky,* 309 U. S. 83 and *Ott v. Mississippi Valley Barge Line Co.,* 336 U. S. 169).

It is respectfuly submitted that Section 1254 (2) is complementary to Section 1257 (2). In the first, a party is given authority to appeal from an adverse decision in a United States Court holding a state statute invalid because of repugnancy to the Constitutional treaties or federal law. In the second, a party may appeal from a decision in a state court where a state statute is drawn in question and held valid despite the claim raised that it is repugnant to the Constitution and laws of the United States.

In practice these statutory provisions give to either a State or the United States opportunity to appeal as a matter of right from an adverse decision in the forum of the other when state law and federal Constitution are held in conflict.

In any event should appellant's direct appeal be deemed ineffective, review of the issues raised may be pursued by virtue of the Court's grant of certiorari January 14, 1957 in No. 563, October Term, 1956.

> *Bradford Electric Light Co. v. Clapper,* 284 U. S. 221, 224.

STATUTES INVOLVED

(v) Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix attached hereto.

> *Armed Services Procurement Act of 1947,* Public Law 413 of 80th Congress, C. 65, 62 Stat. 21 *et seq.*, as amended, 41 U. S. C. A. Sec. 151 *et seq.*

R. S. 3648, 31 U. S. C. A. 529 (as amended August 2, 1946, 60 Stat. 809).

C. 288, Title III, §305, 63 Stat. 396, as amended, 41 U. S. C. A. Sec. 225.

C. 593, 55 Stat. 838, Sec. 201, 50 U. S. C. Append. 1946 ed., Sec. 611.

C. 440, 54 Stat. 676, 50 U. S. C. A. Sec. 1151.

Procurement Regulations, 12 F. R. 7693.

Sec. 211.1 C. L. Mich. 1948.
Sec. 211.10 C. L. Mich. 1948.
Sec. 211.40 C. L. Mich. 1948.
Local Act, Mich. No. 6, 1943, Sections 1, 2 and 4.

Charter of the City of Detroit:

Sec. 1 of Title VI, Chapter II.
Sec. 2 of Title VI, Chapter II.
Sec. 6 of Title VI, Chapter II.
Sec. 7 of Title VI, Chapter II.

Sec. 1 of Title VI, Chapter IV.
Sec. 26 of Title VI, Chapter IV.
Sec. 27 of Title VI, Chapter IV.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Were provisions for transfer of title to United States of materials in possession of an independent subcontractor unauthorized under federal law?

2. If inclusion of title-transfer provisions in appellee's sub-contracts was authorized, did related contract terms and undisputed course of conduct nevertheless establish ownership in appellee and paper title in government?

3. Are these state and local tax laws and non-discriminatory taxes levied thereunder valid inasmuch as no direct burden is imposed on the federal government in violation of its implied constitutional immunity?

The Courts below said "No" to these three questions.

STATEMENT OF CASE

Nature of Assessment and Tax

The assessment on which the tax in question was based covered personal property of appellee valued altogether at $12,183,180 as of January 1, 1952. (Complaint, paragraph 3, R. 4.) Of this, appellee complained that certain items described as belonging to the United States had been included, the value of which was resolved after hearing by Michigan State Tax Commission as being in amount of $2,043,670 (R. 84).[4]

Such items consisted of basic materials purchased from suppliers by appellee, an independent subcontractor, which it was processing for parts and components of aircraft and aircraft engines to be delivered to Kaiser Manufacturing Company and to Curtiss-Wright Corporation, respectively. The latter were prime contractors with the United States Air Force and were engaged in manufacturing airplanes for the United States Air Force (R. 4).

Said total assessment appeared on the 1952 assessment roll as charged to Murray Corporation of America. On the same specific line the assessing officer stamped this notation: "Assessed subject to prior rights of Federal Government" (Appellants' Exhibit 3, R. 103-104).

Said assessment was made under Charter of the City of Detroit (Section 1 of Title VI, Chapter II) pursuant to authority of General Property Tax Act of Michigan,

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[4] Not all of the materials being produced or processed for Government use by appellee under its several sub-contracts are included in the amount complained of. Some purchases of materials were made by appellee under other sub-contracts which differed from the Wright and Kaiser sub-contracts in that they did not provide for partial payments and passage of title (R. 96).

Act 206, 1893 (C. L. 1948, 211.1 *et seq.*, M. S. A. 7.1 *et seq.*). The first section of the latter Act reads as follows:

> "That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

In accordance with Section 11 of said Act (M. S. A. 7.11) corporate property is assessed as follows:

> "All corporate property, except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation. * * *"

In addition the following provision appears in the City Charter of Detroit, adopted June 25, 1918, Title VI, Chapter II, Section 1:

> "Section 1. All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. Assessment shall be made according to assessment districts, the boundary lines of which shall conform to ward boundaries as established from time to time by the common council. There shall be an assessment roll in book form for each such district. All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not."

This is made applicable to the County of Wayne by Local Act No. 6, Mich. 1943, Section 1 of which provides:

> "Sec. 1. That hereafter when the assessment rolls of the different wards in the city of Detroit, for city taxes, are annually, fully and finally confirmed, as prescribed by the provisions of the city charter, it shall be the duty of the board of assessors of said city to make a copy of the assessment roll of each of

said wards, to be known as the state and county tax rolls, * * *."[5]

Following completion of the 1952 assessment rolls, appellee complained in writing to the Detroit Board of Assessors expressing its contention that government owned property had been included in its assessment. Considering itself aggrieved by the assessment and decision of the Board of Assessors appellee took an appeal to the Board of Review. Upon confirmation of the assessment, an appeal was taken to the State Tax Commission which denied same leaving the assessment as shown by Exhibit 3 (R. 103-104).

The City tax bill made out to appellee, based on its total assessment, was paid in two installments to the City Treasurer by appellee—half on August 12, 1952 and the balance on January 15, 1953. The County tax bill, likewise based on the same assessment, was paid to the County Treasurer on January 15, 1953. Accompanying each such payment was a written protest complaining of that portion of the total amount which covered the items claimed to be property of the Government (R. 8).

Form and Provisions of Contracts

Appellee's sub-contract with Kaiser (R. 169) consisted of a letter of intent executed March 23, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended August 15, 1951 (R. 173) and again on October 4, 1951 (R. 181), under Kaiser's letter Prime Contract No. AF 33(038)-18481 with the United States Government entered into December 20, 1950 and subsequently amended (R. 142-168).

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[5] Other applicable provisions of the charter appear in appendix to this brief.

Appellee's other sub-contract was with Wright. It was likewise a letter of intent executed April 19, 1951 (R. 216) for the manufacture of certain parts and sub-assemblies therein specified, amended on May 24, 1951 (R. 222) under Wright's Prime Contract No. AF 33(038)-18132 with the United States Government as subsequently re-amended (R. 189-215). The respective prime contracts were entered into as a result of negotiations between the Air Force Contracting Officers and the prime contractors (142) and (190).

Authority is claimed from Section 2 c (1) and (10) Public Law No. 413, 80th Congress, entitled Armed Services Procurement Act of 1947 which may be found in Title 41 U. S. C. A., Section 151 c (1) and (10), (R. 143, 191). Legal authority for inclusion in these contracts of certain provisions for partial payments and title passage and construction thereof in the light of companion provisions is one of the questions to be resolved in this case.

The letter prime contract between Wright and the latter referred to a so-called Basic Agreement No. 1 and made it a part of the contract between them (Stipulation No. 1 (9), R. 84). Superseding definitive sub-contracts and prime contracts were not agreed upon nor made effective until after the assessment date herein.

Analysis of Partial Payment Provisions

Applicable provisions authorizing making of partial payments to appellee upon property acquired or produced by it for performance of its sub-contracts were incorporated by addition of a new paragraph 11 (Exhibit 2 B). It begins with Subdivision (a) of said paragraph (R. 174-5).

Subdivision (b) provided that upon the making of any partial payment under the contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by appellee for the performance of the contract, and properly chargeable thereto under sound accounting practice, should forthwith vest in the Government; and title to all like property thereafter acquired or produced by appellee for performance of the contract and properly chargeable thereto as aforesaid should vest in the Government forthwith upon such acquisition or production.

Both sub-contracts contained a number of reservations in sub-paragraphs (d), (e) and (f) immediately following the partial payment-title passage clause. Notably, the right to acquire or dispose of property upon terms approved by the Contracting Officer was reserved in the subcontractor (Murray) both before and after termination at the option of the Government (Exhibit 2B, 11(d), R. 176). After termination further provisions under the termination article controlled. Accordingly production scrap could be sold by the sub-contractor prior to termination without approval of the Contracting Officer.

The proceeds in either case were to be paid or credited to the Government as the Contracting Officer might direct where not exceeding the balance of any partial payments (Exhibit 2B, 11(d), R. 176).

Upon liquidation of all partial payments received by the sub-contractor (Murray) or upon completion of deliveries called for by the contract, title vested in the latter to all property (or proceeds thereof) not delivered to and accepted by the Government under said contract or not incorporated in supplies delivered and accepted and to which title vested in the Government under the partial payment provisions (Exhibit 2B, 11(d), R. 176).

Further, property to which the Government acquired title by virtue of said provisions was nevertheless excepted from effect of contract article entitled "Liability for Government Furnished Property". The sub-contractor was not relieved from risk of loss or destruction of or damage to property to which title vested in the Government under the partial payment-title passage clause (Exhibit 2B, 11 (e), R. 177).

Moreover, advance payment provisions included in the contract stipulated that at any time that partial payments might be made to the sub-contractor (Murray) under the partial payment article if there should remain an unliquidated balance outstanding of advance payments, then the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment would be required to be deposited in the special bank account or accounts maintained as required by the advance payment article and withdrawn pursuant to its provisions (Exhibit 2B, 11(f), R. 177).

References made herein to contract terms are directed to the Kaiser-Murray sub-contract. The same terms were incorporated by amendment of Kaiser prime contract (Exhibit 1, Amend. No. 4 (2b), R. 161-2).

Substantially similar terms were made part of the Wright-Murray sub-contract (Exhibit 5A, (5), R. 219) and Wright prime contract (Exhibit 4, Amend. No. 2 (2c), R. 202) and (Exhibit B, R. 204).

Requests for such reimbursement (partial payments) were made by plaintiff[6] to the respective Prime Contractors (R. 236-255) and payments were thereafter accordingly received from Kaiser in the aggregate amount of $163,949.20 on October 12, 1951 (R. 258) and from Wright in the amount of $510,827.67 on December 31, 1951 (R. 259-261).

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[6] To Kaiser—Aug. 10, 1951, Sept. 21, 1951, Oct. 24, 1951, Dec. 10, 1951 and Dec. 20, 1951.

To Wright—Oct. 30, 1951, Dec. 6, 1951.

Proceedings in District Court

The United States was permitted to intervene on its petition for leave (R. 79).

On March 11, 1954 the consolidated action was heard nd submitted before Hon. Thomas P. Thornton, District Judge (R. 104-111) on appellee's motion for summary udgment filed January 6, 1954 (R. 38-75).

Between these two dates depositions were taken at appellants' request, records of appellee Murray were examined and stipulations were prepared, executed and filed o the end that the matter could be submitted to the Court pon undisputed facts for his determination as a matter f law based upon the pleadings, stipulations, depositions nd exhibits (R. 82-104).

Stipulated Facts

Out of these extensive depositions, four stipulations ere entered into, presenting factual elements of the case r consideration by the Trial Judge. Highlights of these ipulations indicate the following:

Tools already owned and furnished by the United States overnment to appellee Murray under a separate fa- ilities contract were not assessed and therefore are not volved in this dispute (Stipulation No. 1 (3), R. 82).

Tools built and completed by Murray under its sub- ntracts on which there had been inspection at the plant prior to January 1, 1952 for use there in performance of said sub-contract were not included in the assessments.

No supplies or sub-assemblies (end products made by appellee) had been completed, inspected or delivered to either of the Prime Contractors by appellee under said letter sub-contracts prior to January 1, 1952 and all materials, supplies and such uncompleted items as were on hand on assessment day were included in the assessment being challenged (Stipulation No. 1 (5), R. 83).

Murray was sole beneficiary under its insurance policies in force on January 1, 1952 on all real and personal property * * * all while located in and/or on the premises occupied by the insured. No interest of any other claimant is noted, not even of the Federal Government (Stipulation 1 (6), R. 83).

All auditing of appellee's books, controls, inspection and participation in its negotiations with the Prime Contractors (Kaiser and Wright) was for the purpose of effecting clearances for said Prime Contractors with the Air Force under their prime contracts. This applied, of course, insofar as appellee's goods and payments received from the Prime Contractors were elements of cost to be cleared by the Air Force when billed therefor by the Prime Contractors (Stipulation No. 2 (4c), R. 87).

Otherwise the Air Force had no direct supervision over the sub-contractor with regard to the latter's costs (Stipulation No. 2 (4d), Ibid).

Stipulation No. 4 (R. 94-101) was based exclusively on the deposition testimony of Mark I. Sammon, Assistant Treasurer of the taxpayer whose affidavit was filed earlier in support of appellee's Motion for Summary Judgment.

From such depositions it appeared that an analysis of costs bearing on appellee's request for partial payments included:

(a) Liaison work, machinery movement, time study, tool engineering, plant layout, planning and scheduling, engineering of portable tools, repair and maintenance of motors, engineering records, crib attendants, templates, traveling expenses, depreciation and taxes, and blueprints.

(b) Tooling costs,—which at the beginning were greater than production costs. As Murray progressed, however production costs by far exceeded tooling.

(c) Costs for certain intangible items in make-ready preparation were used as an element of costs for purpose of its requested partial payments here involved. However, these intangible items were excluded from the assessment figure which was based only on raw materials, tooling, in-process inventory and unbilled shipments, pertaining to the sub-contracts here involved and which were on hand on January 1, 1952 (Exhibit A attached to complaint (R. 8-11)) (Stipulation No. 4 (3), R. 94).

It further appeared that no notice was given to creditors of the taxpayer of the claimed passage of title to the United States after making the first partial payment. No written documents of conveyance covering the said personalty were executed and delivered by appellee to the United States or to the Prime Contractors nor were any deliveries made prior to January 1, 1952 (Stipulation No. 4 (5), (6), R. 95).

Further it appeared that no change was made by appellee in its accounting procedure or methods pertaining to said personalty after receipt of a partial payment than were in effect before. Included in its Acct. No. 1280 in which the subject property was accounted for, appellee commingled a record of materials purchased on other defense contracts unrelated to the claim of title in the Government, no provision for partial payment and transfer of title being present therein (Stipulation No. 4 (7), R. 96).

As shown (in the unnumbered paragraph at top of p. 97) appellee's annual report published under date of August 31, 1951 made no specific reference to any sum of $125,000 as a segregated account receivable. This figure represents the total of two items submitted by appellee for partial payment, requested before, although not received until after, said August 31, 1951.

The following year appellee labelled its situation relating to the matter of Government Contracts as: "Total Recoverable Amounts Applicable To Government Contracts" (Stipulation No. 4 (7), R. 97).

It further appeared that there was no different physical action or treatment in handling or dealing with the property in question after receipt of partial payments than before (Stipulation No. 4 (8), R. 98).

It further appeared that responsibility for determining whether rejected items should be worked over was left to appellee's employees. This was distinguished from scrap generated in the performance of the contract.

Even if spoiled work was re-worked and eventually scrapped the cost thereof would all be included as part of appellee's cost of other items eventually produced and delivered under the sub-contract.

Where scrap of any kind was disposed of, the proceeds received by appellee to the extent that same did not exceed the unliquidated balance of the partial payments were paid or credited to the Government as the contracting officer directed (Stipulation No. 4 (11, 12), R. 98).

It further appeared that appellee had not billed nor had it been directly paid or reimbursed for the specific amount of 1952 personal property taxes herein involved. Nevertheless it did include the amount of taxes paid by it as an element of burden in computing costs submitted for forward price redetermination and retrospectively as to goods completed and delivered prior to the date of the first price redetermination (Stipulation No. 4 (13), R. 99). Such redeterminated prices were negotiated between appellee and its respective Prime Contractors (Stipulation No. 4 (13), R. 99).

In the same way the Prime Contractors included redetermined prices (which involved negotiating on all cost items of which taxes were but one of many) to the extent paid as part of their costs submitted to the United States Air Force (See also Stipulation No. 2 (5), R. 87).

In this connection the following appears in the deposition[7] of Mark I. Sammon, Assistant Treasurer of appellee:

> "We have collected—I can't say we have collected all of it (1952 taxes) and I can't say we haven't. As it would enter the inventory if the inventory were completely liquidated, yes. If the inventory as it is were not completely liquidated, I don't know what portion would be left." (Deposition Transcript p. 108.)

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[7] The deposition transcript with attached exhibits referred to has not been printed due to its great length but has been filed with the Court below pursuant to Order dated December 2, 1955 (R. 139).

It was stated that under certain circumstances there was a definite possibility that the taxes here sought to be recovered would not be refunded to the Prime Contractors at all by appellee. This would follow as a result of such renegotiation if Murray's profits on these defense contracts on an over-all company-wide basis were not found excessive (Final sub-paragraph of Stipulation No. 4 (13), R. 99-100).

Shipments of materials and products called for by its sub-contract with Wright were made to the latter's plant in New Jersey. Documents accompanying such shipments were of the usual type of bill of lading and invoice exemplified by Deposition Exhibits 3 and 4 (R. 100). (See reference, *supra,* to footnote 3.)

No bills of lading were used on shipments to Kaiser, same being made by appellee's trucks to the Willow Run Plant (Stipulation No. 4 (14), R. 100).

Such property was identifiable prior to January 1, 1952 by tagging, labeling or by segregation, all according to such letter sub-contract by number and description. Also it was segregated from other personal property owned and used by appellee in connection with its automotive and other operations.

Appellee's aircraft operations were separated from its automotive and other operations and under the supervision of a separate division manager and supervisory staff (Stipulation No. 4 (8), R. 97).

The agreed upon dollar valuation of personal property here assessed is $2,043,670.00. The claim of appellee against appellant City is in the sum of $67,714.96 and against appellant County in the sum of $12,572.66, exclusive of interest from the date same was paid under protest prior to commencement of the several actions herein (Stipulation No. 1 (8), R. 84).

After hearing of oral arguments on the Motion for Summary Judgment (R. 104-111) on March 11, 1954 and taking the matter under advisement on briefs filed, the District Judge filed his written opinion thereon on June 23, 1955 (R. 112-122).

An Order granting appellee's Motion for Summary Judgment was accordingly signed on June 29, 1955. On the same day judgments were entered against the City of Detroit in Action 12108 in the total sums claimed together with interest or $38,733.97 and in Action 12482 in the total sum claimed together with interest or $38,014.50; and against the County of Wayne in Action 12483 in the total sum claimed together with interest or $14,116.30.

Notices of Appeal therefrom were filed by the respective appellants and Orders Staying Proceedings entered upon filing Supersedeas Bonds on July 27, 1955.

Said appeals were consolidated and argued before the Court of Appeals, Sixth Circuit, on June 4, 1956 (R. 271). The judgments were affirmed on June 16, 1956 pursuant to opinion of the Court (R. 271-277). An Order Staying Mandate was entered July 13, 1956 (R. 277) and extended August 10, 1956 (R. 278).

Notices of Appeal to the Supreme Court were filed July 25, 1956 and the consolidated cause docketed on September 10, 1956 (R. 278-283).

In the meantime a petition for certiorari was filed which was granted (R. 284) on the same day (January 14, 1957) as the Court entered an Order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 284).

SUMMARY OF ARGUMENT

i

Inclusion of partial payment-title passage provisions in the sub-contracts entered into by appellee with Kaiser-Frazer Corporation and Wright Aeronautical Corporation, prime contractors with the United States Air Force, were not authorized by and were impliedly prohibited by Congress. Payments in excess of value of articles delivered were prohibited by 31 U. S. C. 529, except as Congress otherwise directs.

The prime contracts underlying appellee's sub-contracts were entered into on authority claimed from Armed Services Procurement Act of 1947, 41 U. S. C. 151, which made no mention of partial payments or passing title. Sec. 611 of 50 U. S. C. which does authorize partial payments was not claimed as authority by either appellee or the Government. Sole provision for payments in the Procurement Act are found in Sec. 5 in the form of advance payments with security in the form of a lien for protection of the Government.

The Procurement Act of 1947 under which these prime contracts were negotiated departs from usual advertising and sealed bid methods. Specific conformance with its provisions was mandatory. No authority to include another provision for payment may be implied save in the form prescribed by Sec. 5.

Legislative enactments in the past dealing with partial and advance-payments never required more than security in the form of a paramount lien for the Government's protection. Failure to even mention partial payments or title passing provisions or include them in sample forms of contracts exhibited before Committees of Congress considering H. R. 1366, adopted as Armed Services Procurement Act, negatives any implication that procurement officers were intended to have the broad powers urged by appellee and the Government herein.

Contrary to conclusions of Court below, distinctions in this case patently set it apart from *United States of America v. County of Allegheny*, 322 U. S. 174. Authority of procurement officers are challenged here and none of the personal property completed, accepted and paid for by the Government in appellee's possession on tax day was included in the assessment in question as it was in Allegheny. Further the Government's interests have been protected by noting on the roll that the assessment to appellee was "subject to prior rights of Federal Government" and finally both by local law and in practice the assessment was *in personam* and not *in rem* as in Allegheny.

ii

For the purpose of the second section, appellants assume that the partial payment-title vesting clause of Murray's subcontract was authorized and effective to vest some type of interest in the Government.

The substantive approach of the Court in tax problems, which disregards formalisms and considers all the circumstances of each case, requires a consideration of these important factors in the instant matter: (1) The related contractual provisions, (2) the conduct of the parties with reference thereto, and (3) other related procurement regulations.

We contend that the following provisions are inconsistent with the claim of ownership in the Government and substantiate our claim that the Government's interest was merely a security or paper title to secure its advances to appellee: The subcontract does not relieve Murray from risk of loss or destruction of the property; for all practical purposes Murray had the right to acquire and dispose of all property and to determine what parts of the property constitute scrap and to dispose of same to its own advantage. Title to all materials and work in process in its hands would vest in Murray upon liquidation of all partial payments. Hence, the Government's interest, once divested upon liquidation, could only be revived upon further partial payment.

Murray's actions, as hereinafter fully outlined, were likewise inconsistent with the theory of title-transfer to the Government, and the Government fully acquiesced in Murray's actions.

Army Regulations treat partial payments as a method of financing for contractors. They also except as Government property materials subject to partial payment provisions. An interpretation of the partial payment-title vesting clause, in the light of these Regulations, as vesting a beneficial title in the Government requires a strained and unrealistic construction and gives to the Government a type of interest which we believe neither Congress nor the contracting parties ever intended it to have. When, however, the clause is read together wtih related provisions of the subcontract and in the light of applicable procurement regulations, and is considered in connection with the conduct of the parties in relation to the contract, we earnestly contend that the clause must then be construed as granting to the Government a lien to protect its advances to assist in the financing of the contract. Only under such an interpretation does the clause become meaningful and in harmony with the conduct of the parties and with the applicable procurement regulations.

iii

The facts and law in this case are in harmony with correct principles of the implied governmental immunity doctrine as established by this Court and these taxes are valid thereunder. Said taxes are not taxation of the means employed by the Federal Government for the execution of its powers nor do they retard, impede, burden (except possibly economically) or in any manner control the operations—of the general government for the reason that the incidence of these taxes is not against the Government, its instrumentalities or its property and, therefore, they constitute no direct burden against the United States under this Court's decisions.

The tax laws involved, as they are here administered and interpreted, fix the liability and responsibility for the payment of these taxes and make them a charge against appellee personally. They may be collected from appellee both by suit against the corporation for collection of debt and by seizure of the corporation's property other than the property here claimed to be owned by the United States. These tax laws, so interpreted by the Michigan Supreme Court, determine the incidence of the tax against the person named on the assessment roll, appellee herein, there being no question as to the identity of the taxpayer (Murray) under the terms of these contracts, and those findings are conclusive upon this Court.

Whatever interest the Government has in the materials used by appellee in the performance of its subcontract to a Government prime contractor is protected by subjecting the assessment to prior rights of the Government and by decisions of this Court holding that neither the Government nor its property may be subjected to any action or proceedings for collection of the tax.

There can be no distinction between *ad valorem* property taxes of this character and privilege, excise or other taxes under the immunity doctrine when an independent contractor bears the full impact of the taxes equally in each case and the Government and its property is equally free from destruction or interference in each instance. The substance and effect of the tax, not its name, is controlling in the determination of this Court as to whether it is a tax upon the means of government operations or any attempt to impede, retard, burden or control Government operations.

The traditional immunity of the Federal Government and its property should be distinguished from attempts to create immunity by ingenious contract words having no substantial relation to the protection of the sovereign from hostile action of the States but devised mostly for the Government's or a contractor's specific economic benefit.

The materials acquired or produced by appellee here claimed to be owned by the Government were never purchased by the Government under these contracts as materials nor was it so intended there not even being any privity of contract between appellee and the Government. The prime contracts were solely for the purchase of completed and inspected planes, engines, assemblies and parts and hence materials, whether in the hands of prime contractors or appellee, were never intended as "means of Government operation";—only the final delivered assemblies, parts, planes and engines being in that category.

These partial payment-title transfer clauses create situations in which some Government contractors must pay personal property taxes according to the full value of all materials in their possession (having made no request for partial payments) while other contractor's materials are immunized because they requested and received a partial payment. The local community, therefore, may be reimbursed by one contractor for his share of the costs of local police, fire, health and other service and not by the other. It is inconsistent that similar materials being processed by contractors for eventual delivery of identical products to the Government should be labeled as means of Government operation in the one case but not in the other. This is an anomaly that cannot withstand the tests laid down by the Court to determine true immunity because the creation of such immunity is left entirely to the financial needs or whims of a private contractor.

Inasmuch as there is no direct burden laid upon the Government and there is only a remote (economic), if any, influence upon the exercise of functions of Government in the imposition of these taxes; and, there is no attempt to destroy, hamper or control the Government or its contractors in carrying out these contracts, there is no discrimination against or interference with the Government's operations, these taxes should be held valid under principles of implied immunity heretofore proclaimed by this Court.

ARGUMENT

I.

WERE PROVISIONS FOR TRANSFER OF TITLE TO UNITED STATES OF MATERIALS IN POSSESSION OF AN INDEPENDENT SUB-CONTRACTOR UNAUTHORIZED UNDER FEDERAL LAW?

The Lower Court answered "No."
Appellants contend the answer should be "Yes."

Appellee Murray asks this Court to uphold immunity from a non-discriminatory personal property tax assessed to it upon and according to the valuation of personal property in its possession on January 1, 1952, which it acquired and was fabricating for profit as an independent sub-contractor. It seeks to avoid its proportionate share of heavily increased burdens of the City and County in furnishing service and protection to its citizens including appellee.

Appellants contend that such claim of derivative immunity is not authorized by and is contrary to the express policy of Congress.

Congress has spoken through two statutes. Both applicable statutory provisions are relatively new either by recent amendment or by original enactment. These must be studied for changes, if any, and implications naturally flowing from such changes.

First, *Title 31 U. S. C. A., Sec. 529* as amended August 2, 1946, (formerly R. S. 3648), is a definitive statute with respect to advancement of public moneys:

> "No advance of public money shall be made in any case unless authorized by the appropriation con-

> cerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *"

This we contend defines and limits the powers of government officers in such matters, except as Congress otherwise directs.

The other applicable statutory provision is *62 Stat. 21, Ch. 65 Public Law 413 (80th Congress), Title 41, U. S. C. A., Sec. 151 et seq.*, the *Armed Services Procurement Act of 1947* (Appendix 1a). Authorization for advance payments may be found here—no mention being made of partial payments.

From the latter statute, appellee claimed authority for inclusion of the controversial partial payment and title passage clause, *not as an express but as an implied power.* Appellants submit that none being expressed save in the form spelled out by *Section 5* thereof, applicable to cases of negotiated contracts such as we have here, no such authority may be implied.

It was said in *Clifford F. MacEvoy Company v. United States of America*, 322 U. S. 102, at page 107 U. S.:

> "However inclusive may be the general language of a statute it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which might otherwise be controlling.' *D. Ginsberg and Sons v. Popkin*, 285 U. S. 204, 208, 76 L. Ed. 704, 708, 52 S. Ct. 322, 19 Am. Bankr. Rep. (N. S.) 589."

Neither can it be claimed nor had appellee asserted that the *Armed Services Procurement Act* was intended to repeal the provisions of *Section 529, as amended, supra.* It is appellants' position that the *Armed Services Procurement Act* wherever applicable must be read in the light of and in such a manner so as to work in harmony with the former.

A statute must be so construed so that its provisions will not impair the operation of other laws which it is not reasonable to suppose the legislature intended to repeal. *Mills v. Scott*, 99 U. S. 25.

In a somewhat similiar situation a test was made of authority of government officials claimed to flow from statutes there involved. The United States in an original suit brought against State of Arizona (*United States v. Arizona*, 295 U. S. 174), had sought to enjoin interference with the construction by the United States of a dam in the Colorado River. The Supreme Court dismissed the complaint as failing to show construction of the dam was authorized.

This Court's opinion in Arizona indicates that the facts alleged did not show necessary prior approval "by direct order of the President" as required by Section 4 of Act of June 25, 1910, U. S. C. A. Title 43, Sec. 413.

Plaintiff there urged such approval had been given through executive action under the National Industrial Recovery Act. It relied on Sections 201a, 202 and 203 of the Act and Executive Order No. 6252.

The opinion states at page 188 U. S.:

> "We find nothing in the Recovery Act that reasonably may be held to repeal the requirement of that section. It follows that the construction of the dam has not been authorized as required by the Reclamation Law."

And further on the subject at page 191, *ibid.*:

> "As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown. *U. S. v. Jefferson Electric Gas Co.*, 291 U. S. 386, 396, 78 L. Ed. 859, 868, 54 S. Ct. 443. In the light of that rule it is clear the general language of the Recovery Act on which plaintiff relies does not evidence intention on the part of Congress to change its well established policy."

Another parallel to our situation here appears in the *rizona case, supra.*

In support of the construction for which it contended here, the United States asserted that it was under the eclamation Laws (Section 25 of the Act of April 21, 904, 33 Stat. at L. 224, Ch. 1402) that the Secretary of he Interior built the Laguna Dam across the Colorado. he opinion disposes of this by stating at page 186 of 95 U. S.:

> "But it does not appear that either riparian State objected or that the validity of his authority has ever been drawn in question."

This view coincides with our position that the *Mesta* ase (*U. S. of America v. County of Allegheny*, 322 U. S. 74) is not applicable to the facts here before the Court. r. Justice Jackson similarly commented on the failure question adequate Congressional authority at p. 182:

> "* * In this case *no contention is made that the contract with Mesta is not fully authorized by the congressional power* to raise and support armies *and by adequate congressional authorization* to the con-

> tracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statutes." (Emphasis supplied.)

In this action we have and do raise the issue of authority.

No Authority for Partial Payments in Connection With Negotiated Contracts

Neither authority for nor express prohibition against partial payments appears in the *Armed Services Procurement Act of 1947, supra.* Our position that contracts pursuant thereto required conformance with its specific directions is warranted in view of authorized departure from usual advertising and sealed bid methods employed in the letting of contracts by the War and Navy Departments.* The bill (H. R. 1366, 80th Congress) when introduced by the Committee to the House of Representatives was characterized as containing safeguards designed to prevent abuses and "narrowed the circumstances in which contracts may be negotiated and has taken further steps to protect the interests of small business" *(p. 5 House Report 109, 80th Congress, U. S. 11118).* (An edited version of same appears in *Vol. 2 United States Code Congressional Service, 80th Congress, Second Session, 1948,* at pp. 1048, 1064.)

Appellants accordingly submit that it was the Congressional intent to prescribe definite limits in the case of negotiated contracts. It may not logically be urged that former practices, or implications, may enter into negotiated terms in the face of specific, expressed provisions. The following support for appellants' position comes from review of (a) prior legislation, (b) views expressed in the Armed Services Committee and (c) applicable decisions of the Courts.

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*Sec. (151c), Appendix 1a.

A. Congressional View of Advance-Partial Payments

Legislative history of payment in advance for services to be performed or articles delivered for the use of the United States reveals invariably that such provisions were treated as an exception and sometimes for limited periods and not as a general method of operating.

Such statutory restriction has been the Government policy during all of World War II. Even prior thereto in dealing with partial payments on work for Navy contracts we find *(Title 34 U. S. C. A., Section 582[*])* that partial payments shall not be made "in excess of the value of work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: * * *." In much the same manner an Act of October 6, 1917, c. 79, Sec. 5 (40 Stat. 383) authorized the Secretaries of War and the Navy, *during the then existing emergency*, to make advance payments from available appropriations to contractors for supplies for their respective departments. (Note to Title 31, U. S. C. A., Sec. 529.)

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[*] "The Secretary of the Navy is authorized, in his discretion, *to make partial payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of the value of work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made:* Provided, that partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions. (Aug. 22, 1911, c. 42, 37 Stat. 32.)"

Again during World War II the matter of partial payments and the question of adequate security in Government procurement contracts was carefuly enacted in *Title 50 U. S. C. A., Section 1151.* This provided for advance and partial payments of defense contracts and a lien for partial payments. The advance payments were limited not to exceed 30 per cent of the contract price and adequate security for the protection of the Government for the payments so made was required.*

It may be noted that *Section 1151,* applicable to war defense contracts in the Second World War, expressly provided for the same lien as contained in Navy contracts *(34 U. S. C. A., Section 582 set forth above)* when partial payments were made.

The policy set forth in *Section 1151* is continued by *Section 611 of Title 50* during the present emergency and by Sec. 5 of *Armed Services Procurement Act of 1947, 62 Stat. 21, Ch. 65 Public Law 413 (80th Congress) Title 41 U. S. C. A., Section 154(a) and (b).* (Appendix 2a, 3a.)

Although 50 U. S. C. 611 were enacted as an emergency measure December 18, 1941, c. 593, Title II 201, 55 Stat.

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* "Whenever in the opinion of the President of the United States such course would be in the best interests of national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy, or the Secretary of the Treasury in the case of Coast Guard contracts, is authorized to advance, from appropriations available therefor, payments to contractors in amounts not exceeding 30 per centum of the contract price, upon such terms as such Secretary shall prescribe, and adequate security for the protection of the Government for the payments so made shall be required. The Secretary concerned is further authorized in his discretion to make partial payments on the balance of the contract price from time to time during the progress of the work, such partial payments not to exceed the value of the work already done, but to be subject to a lien as provided by the Act of August 22, 1911 (37 Stat. 32; 34 U. S. C., §582), entitled 'An Act authorizing the Secretary of the Navy to make partial payments for work already done under public contracts': * * *." (June 28, 1940, c. 440, 54 Stat. 676.)

839, it was reactivated several times by Congressional amendment until 1956. So it was in effect at the time the contracts involved here were made.

Under said Act the President was authorized by Executive Order to enter into contracts without competitive bidding in those cases where bidding was still required; to enter into contracts without performance bonds; to amend or modify contracts; and to make progress payments on contracts. In reporting H. R. 6233, 77th Congress to the House, the Committee on the Judiciary offered this explanation (Report No. 1507 II, House Misc. Reports VII, U. S. 10558):

> "One of the objectives of this provision is to facilitate the letting of defense contracts to small businessmen who in many cases cannot make the goods at as low a price as the big corporations, who are often not in a position to furnish performance bonds and who need progress payments."

Both House Report 1507 and Senate Report 911 dealing with the same matter, which was adopted as 611, had attached thereto an appendix which concludes with the following:

> "III. Provisions concerning Advance and Partial Payments.
>
> A. 31 United States Code, Section 529, is a general prohibition against paying for any government purchase before delivery or before title is taken to it.
>
> B. Statutes presently giving some, but inadequate relief against these provisions:
>
> 34 United States Code: Section 582.
> Seventy-sixth Congress: Public, Nos. 671, 703."

We submit this illustrates that were there unquestioned authority for the use of partial payment-title passage clauses as urged, Congress would not be asked by the defense departments for statutory relief.

Furthermore, authority for partial payments to be included in procurement contracts existed by virtue of 611 and Executive Order 10210 (February 2, 1951, 16 F. R. 1049). Nothing therein suggests passage of title, however, and appellees and the Government apparently saw fit not to use such authority but negotiated these contracts with Kaiser and Wright pursuant to the Armed Service Procurement Act and their assumed authority.

Similarly, in setting up *Procurement Procedures* for the government's general services by adoption of *Title 41 U. S. C. A., Section 255,* Congress provided in identical terms the provisions for a paramount lien in the case of advance payments as set forth in *Section 5* of the Armed Services Procurement Act of 1947. (Appendix 3a.)

Nowhere in any of the preceding statutes which confer these express powers on the Armed Services in procurement contracts do we find any statutory provision authorizing vesting of title to any of the materials acquired or work in process. The statutes provide for a paramount lien only, and that lien alone is deemed by Congress adequate to the protection of the Government.

The imposition of such paramount lien to the extent the materials are paid for is not exclusive of an inferior State tax lien. On the contrary these Congressional enactments are carefully drawn so that benefit of the lien shall accrue to the Government only and not to private persons, no matter how closely associated that private person may be to the Government contract.

The legal title theory is the creation of Government lawyers, blandly over-reaching their procurement powers as limited by Congress; *the title adds nothing to the Gov-*

ernment's security that the paramount lien does not provide. Appellee was charged with notice of limitations of authority in procurement officers. It must prove its right to exemption and cannot rely upon the *ipsi dixit* of procurement officers and its own counsel,—transcending the powers of Congress and nullifying the 10th Amendment for the benefit of appellee.

Congress omitted mentioning partial payments or passage of title in the 1947 Act. Neither was Congressional intent expressed therein as to the meaning of the term "type of contract." Accordingly the Court should examine into the Act's Congressional history for assistance to determine reason, if any, for such omissions from an act intended to replace earlier emergency legislation and provide uniform procurement procedures for all the armed services.

B. Congressional Intent in Considering H. R. 1366 (Armed Services Procurement Act).

Appellants submit that entering into "any type of contract" did not imply the right to use "any type of clause" particularly where all mention of partial payments was omitted from a statute intended to codify earlier procurement laws.

For light on intent of Congress regarding types of contracts which could be entered into, we refer to pertinent portions of committee hearings prior to adoption of the *Armed Services Procurement Act of 1947* on which the subject prime contracts are founded. At p. 5 of *House Report 109* on the pending legislation (*H. R. 1366 (80th Congress, U. S. 11118)*) we note the following:

> "The bill provides that certain determinations and decisions shall be final. It also sweeps away many archaic, conflicting and unnecessary laws."

While this Act retained the time-tested method of competitive bidding, considerable latitude was given procurement officers to negotiate contracts with suppliers,—under conditions plainly spelled out. Appellants submit it must have been intended that permission for any phase of these negotiated contracts should strictly conform with its terms.

Significantly, provisions for financing of suppliers in such a negotiated contract were narrowed to the use of Advance Payments (Sec. 5),—in a much broader form however than those exceptions found in Sec. 529 *(supra)* to the prohibition against advance payments. Where express direction is given to use a particular method of financing, it is submitted none other may be implied.

We believe this is what the Committee must have had in mind when its report to the House of Representatives, *supra*, stated:

> "The Committee has assured itself of the necessity for the restricted authorization of negotiated purchasing which the bill contains, and that the bill as amended embodies the most desirable combination of this procedure and that of competitive bidding."

We offer further the following documentation as support of our claim of Congressional intent. The spirit and scope of the proposed bill were presented in a prepared statement by Kenneth Royall, Under Secretary of War, to said Armed Services Committee of the House in February 1947 *(Vol. 38, House Armed Service Committee Hearings on H. R. 1366 (80th Congress) Library of Congress, Vol. 1, p. 434)*:

> "During that (emergency) period, a continuous study was made of Army and Navy procurement, and on the basis of this study, the two services are convinced not only that there should be additional

> exceptions to the advertisement and sealed-bid rule, but also that there should be a whole new procurement philosophy, that of contract by negotiation in certain well defined classes of procurement where the national defense or sound business judgment dictates that such action be taken. This bill, however, would still not give as broad powers as those now available to the Army and Navy under the First War Powers Act. Nor would it go nearly so far as normal commercial business practices. * * *'"*

When pressed by the Committee concerning types of contracts contemplated under *Section 4 of the Bill,* James T. Hill, who accompanied Honorable W. John Kenny, Assistant Secretary of the Navy before the House Committee, placed on the record at p. 577 of said Hearings *(supra)* this statement:

> "The following are some of the types of contracts currently being used by the Navy Department the use of which would continue to be authorized under this Bill:"

Listed thereunder at pp. 577-578 *(supra)* are definitions of the following:

(1) Fixed Price Contract with Price Redetermination.

(2) Incentive Contract.

(3) Cost-Plus-Fixed-Fee-Contract.

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*This statement leaves unsupported the statement appearing in the opinion in *Kern-Limerick, Inc. and United States of America v. Scurlock,* 347 U. S. 110, 116:

> "* * Under such a provision, it seems that the determination to use purchasing agents is permissible. Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices * * *."

(4) Cost (without fee) Contract.

(5) Letter of Intent.

Earlier at p. 576 *(supra)* we note this exchange:

> "Mr. Brown: Section 4, subsection (a): Except as provided in section (b) of this section 4, contracts negotiated pursuant to section 1 may be of any type which in the opinion of the agency head will promote the best interests of the Government.
>
> Mr. Anderson: Without objection, subsection (a) of section 4 is approved as read.
>
> Mr. Cole: What does that mean, that a contract may be of any type?
>
> Mr. Hill: Prior to the war, the type of contract which was generally used was a lump-sum or fixed-price type of contract.
>
> During the period of the war, it was discovered that other types of contractual arrangements could be contrived which conferred benefits on the Government. I have reference to cost-plus-fixed-fee contracts, cost-with-a-predetermined overhead contracts, time-and-material contracts, so-called incentive-type contracts, and this is intended merely to state that when you get into the field of negotiated contracts, the agencies are free to make that deal which they regard as the best deal from the standpoint of the Government."

This supports appellants' view that use of the word "type" in *Section 4 of the Act* does not go so far as to include "any type of contract clause" such as an attempt to pass title on receipt of a partial payment.

At p. 447 in answer to questions by Committee members:

> "Mr. Anderson: Do you have any further questions, Mr. Philbin?
>
> Mr. Philbin: Yes.

> One of the purposes of this legislation at this time is to carry out the peacetime purposes of the Army and Navy, that is, the procurement agencies of the two departments, with certain powers that you had under the First War Powers Act.
>
> Mr. Royall: That is right.
>
> Mr. Philbin: In these areas defined by the bill.
>
> Mr. Royall: Yes, sir. This bill is not as broad as the First War Powers Act, nor is it as broad as the power that a head of a company would have in his own contracting, but it is broader than we had before the war. It is intermediate between the two.
>
> Mr. Philbin: You feel from your war experience that certain of these powers are desirable?
>
> Mr. Royall: Yes, sir. We have had so many contracts and so many situations, and this is the result."

Examination of record and briefs filed in the Supreme Court in *Kern-Limerick Inc. and United States of America v. Scurlock*, 347 U. S. 110, fails to disclose any reference to these *Reports of the Committee Hearings* to aid the Court. Appellants are inclined to the belief that had this Court had before it reports of said hearings, the majority opinion would have been otherwise in *Kern-Limerick*. (See p. 38 *supra*.)

The Committee went so far as to include, as part of the record, a number of typical contracts in use by the departments with mandatory and optional forms. These appear at pp. 608-616 of the *Report of the Hearings, supra*. In not one instance does the partial payment, title passage clause on work in progress prior to deliveries relied on by appellee appear in those exhibits.

To illustrate, we call attention to a sample letter Order for supplies which appears at pp. 608-9 *(supra)*. W. D. Contract Form No. 7 (Appendix 18a). This indicates in its final paragraph (10) that it is authorized by and negotiated under the First War Powers Act, 1941, and Executive Order No. 9001. December 27, 1942, which permitted partial payments without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. Clearly, terms of the sample contract *are* based on congressional authority and Executive Order. Procurement regulations alone were not considered enough.

Said form only refers to vesting title in Sec. 6f; not in the manner urged here by appellee but only in connection with procedures for settlement of contracts after termination. It is based on the *Contract Settlement Act of 1944 (78th Congress, Public Law 395 Ch. 358).* 41 U. S. C. A. Sec. 101, 112 (e).

It is signficant that representatives of the Armed Services had no other partial payment, title passage clause in these typical forms of contracts. It negatives the implication that procurement officers were endowed with the broad powers urged by appellee and the Government. It is persuasive that they intended financing of private contractors engaged in work for the Government under negotiated contracts, to be governed by the means found in *Section 5 of the Act.*

Obviously, silence on the part of defense department representatives deprived members of said Committee from any opportunity of considering the effect of a partial payment-title-passage clause in a negotiated contract. As representatives from the several States to the Congress they would have realized impact of such a clause on local taxation and resulting impairment of our dual system of government.

It is appellants' view that the Committee considered provisions of *Section 5 (b),* spelling out a lien in favor of the Government, as the maximum protection necessary for financing of contractors in such cases. Nor was a title passage clause requested by sponsors of the measure. Nor would such a title give any more protection or control to the Government than the paramount lien did.

Attempts to explain the actions of the procurement officers lead to just one conclusion: that partial payment provisions were an afterthought and an overreaching on their part.

In their separate briefs, both the Government and appellee claimed support below for authority to use the partial payment and title passage clause from the language used by Mr. Justice Reed in *Kern-Limerick, supra* at p. 116, U. S.:

> "Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices."

We have pointed out the variance between this view and what was actually stated by Armed Services representatives before the Committee considering the measure. (*Supra* p. 38 and p. 40.)

In practice, the term "type" was used in a specific manner in the prime contracts, further refuting appellee's claim.

We note in Kaiser's (R. 142-3):

> "Type Contract Contemplated: CPFF per Amend. #2. Type Price Redetermination Anticipated in Definitive Contract: Incentive."

Likewise in Wright's (R. 190-1):

> "Type Contract Contemplated: Fixed Price. Type Price Redetermination Anticipated in Definitive Contract: Form II B."

It is our view that the quoted excerpt from *Kern-Limerick* is first of all *obiter dicta** and not in accord with the documentation of the Committee Report aforementioned (pp. 38-42, *supra*). Secondly, it is apparent that the principal legal issue as well as the facts of that case are distinguishable from those present here. (*Infra* 115, 116.)

Just as we claim a difference between the facts at bar from those before the Court in *Kern-Limerick*, similarly the brief of the Government in that case urged differences from *King-Boozer* (*State of Alabama v. King and Boozer*, 314 U. S. 1). In the latter case an Alabama sales tax was upheld where an independent contractor purchased lumber for incorporation in construction work under a government contract.

We contend here, as the Government did in *Kern-Limerick*, that the court below herein erred ~~in~~ not determining the issues presented below giving full consideration to all phases of the contract relations between appellee and its respective prime contractors as well as all terms of the sub-contracts.

The fact that appellee herein is an independent contractor operating under subcontracts; that it made its purchases on its own credit and paid for same itself; that its insurance of the subject property named appellee alone as the party benefiting therefrom; that the Government denied any obligation to the subcontractor; that delivery of finished items was to be made directly to the prime contractors, that requests for payment were made directly to the prime contractors,—all of these factors were ignored in favor of one so-called "overriding consideration" (R.

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*The key question submitted and approved by this Court was whether the determination to use purchasing agents, was permissible (p. 116 U. S.).

121) which the trial judge herein held to outweigh the others, and which the Court of Appeals approved.

This, despite the determination of this Court in *King & Boozer, supra,* rejecting the contention of the Government that it was the purchaser based on extensive control by procurement officers over purchases made, whether and what to buy, providing for approval in advance of purchases of $500 or over and inspection and approval before shipment. The following appears at p. 13 of 314 U. S.:

> "But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421, 83 L. ed. 260, 263, 59 S. Ct. 267; *United States v. Driscoll*, 96 U. S. 421, 24 L. Ed. 847. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the contracting officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. *Cf. James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318, *supra; United States v. Driscoll, supra.*"

C. Authority Must Be Found in Statute

Appellee's position with regard to the partial payment and title passing clause is admittedly based not upon statutory authority but upon *Procurement Regulations* (42, 47).* Although careful to claim initial authority for the negotiation of the prime contracts from *Section 2 c of Armed Services Procurement Act, supra,* appellee would have the Court ignore its application to its subcontracts.

It is inescapable that appellee's position must rest squarely on statutory authority from the Act. Otherwise the Committee's stated objective of eliminating possible abuses by its restricted authorization of negotiated purchasing was meaningless.

Ample authority exists in support of appellants' view that claimed authority may not originate solely from rules and regulations of defense organizations in alleged furtherance of a Congressional mandate as found in *Section 5*, (§ 154 of 41 u.s.c).

To so define provisions of an act of Congress as to grant to officials a roving commission to create exemptions from the act falls as an unconstitutional attempt to delegate legislative power (*Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 623). Statutes delegating powers to public officers must be strictly construed (*United States v. Foster*, 131 F. 2nd 3, 7) while all persons dealing with such agents are charged with knowledge of the extent of their authority (*Continental Casualty Co. v. United States*, 113 F. 2nd 284, 286).

It has been held that rules and regulations which aid in carrying out the purposes of a statute must be in accord with the statute, subordinate to and not in conflict therewith (*United States v. Forbes*, 36 F. Supp. 131, 134) and the *status quo ante* acts without or beyond the powers bestowed by law may be restored insofar as that may be done (*United States v. Mott*, 37 F. 2nd 860, 862); also regulations which go beyond what Congress has authorized may be disregarded (*Utah Power & Light Co. v. United States*, 243 U. S. 389, 410) since the plain purpose of a valid law cannot be thwarted (*United States v. City and County of San Francisco*, 310 U. S. 16, 31-32).

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*Appendix 6a.

A regulation that does not carry out the will of Congress but operates to create a rule out of harmony with the statute is a mere nullity (*Manhattan General Equip. Co. v. Comm. of Internal Revenue*, 297 U. S. 129, 134) and an officer in exercising powers conferred upon him by statute and regulation is bound to follow the mode or manner prescribed (*United States v. Jones*, 176 F. 2nd 278, 281). No delegation being given by Congress, the Secretary of War may not prescribe rules and regulations which restrict the application of local regulations (*Penn Dairies v. Milk Control Commission*, 318 U. S. 261, 276); and it has been held that broad powers cannot be merely assumed by administrative officers nor created for them by courts in the proper exercise of their judicial functions (*Federal Trade Comm. v. Raladam Co.*, 283 U. S. 643, 649). Accordingly, principles of general contract law apply to construction of government contracts where Congress has not adopted a different standard (*Priebe and Sons, Inc. v. United States*, 332 U. S. 407, 411).

D. Allegheny Not Controlling Here

Appellee's principal contention that the decision in *Allegheny, supra*, is controlling of the issues here was adopted by both the Trial Judge and the Court of Appeals. However, as already pointed out *supra*, p. 31, no issue was raised in Allegheny of absence of adequate authorization as urged herein.

Further, that decision was handed down May 1, 1944, prior to amendment of Sec. 529 of Title 31 U. S. C. A. in 1946 and the codification of procurement procedures for the armed services resulting from enactment of the Armed Service Procurement Act in 1947.

Refuting the expressed view in Opinion below (R. 274) that "the facts of that case (Allegheny) are not in any material aspect distinguishable from the facts encountered here" we call attention to the following differences:

In Allegheny, as here, a claim of exemption from local taxation was advanced based on a derivative constitutional immunity of government owned property. However, the nature, acquisition and treatment of the property differed. In Allegheny, according to the opinion below (R. 274) same consisted of one machine manufactured by the manufacturer (Mesta) eight gunboring lathes furnished by the Government and the remainder purchased by Mesta from other machine tool manufacturers. The machinery bought or built by Mesta was inspected and accepted on behalf of the United States wihch compensated Mesta therefor. The contract provided that the title to all such property should vest in the Government upon delivery at the site of work.

Here it is stipulated (1) that tools already owned and furnished by the United States were not assessed (R. 82): (2) that tools built and completed by appellee under its sub-contracts on which there had been an inspection at the plant prior to January 1, 1952 for use there in performance of said sub-contract were not assessed (R. 82); and (3) that no supplies or sub-assemblies (end-products made by appellee) had been completed, inspected or delivered to either of its Prime Contractors by appellee prior to January 1, 1952 (R. 83).

Actually assessed against appellee was the value of materials, supplies and uncompleted items on hand on assessment day (R. 83). These had been purchased by appellee, as in the case of any independent sub-contractor, in its own name, on its own credit and not as a bailee or agent for the Government or either prime contractor.

The prime distinction overlooked by the Opinion below is that even without benefit of a title passage clause, the assessed property in Allegheny was owned by the Government on assessment day. On the other hand absent the controverted partial-payment-title passage clause, no one would suggest that these facts support a claim of title in the Government to the disputed items in Murray's possession on tax day.

Another difference not noted by the Court below is the care exercised by the Assessors to protect rights of the Federal Government, if any,—based on the procedure approved in *S. R. A. Inc. v. Minnesota*, 327 U. S. 558. No mention was made in the Opinion appealed from of the notation on the line where appellee's assessment appeared, "assessed subject to prior rights of Federal Government". Instead the opinion sought to distinguish the facts in S. R. A. as being "the equivalent of a mortgage" (R. 277).

Overlooked, however, is the fact that in its decision in S. R. A. this Court continued on to say (565, U. S.):

> "Territorial jurisdiction in Minnesota does not dispose of this tax problem. The nub of this case, that is the immunity from state taxation of property to which the United States holds legal title, remains. Minnesota took care to leave unassessed whatever

> interest the United States holds. The levy and judgment was 'subject to fee title remaining in the United States of America,' 219 Minn. at 496, 18 N. W. 2nd 446 * * *"

Further disregarded by the Opinion below is the nature of the assessment and tax in question as compared to that in Allegheny.

Here we have a type of assessment which is *ad valorem*, i.e. assessed to appellee upon and according to the value of personal property. This is unlike the case of real estate both in this State and in Pennsylvania, where such assessment land is *in rem*. *Schaefer v. Woodmere Cemetery Co.*, 256 Mich. 332, 239 N. W. 300.

The instant assessment is based on the value of such personal property owned by or in the possession of a person, partnership or corporation, but has characteristics of a tax *in personam* rather than *in rem*. (Sections 1 and 7 Ch. II, Title VI and Sections 1, 26 and 27 Ch. IV, Title VI, Charter of the City of Detroit (Appendix 14a *et seq.*). Further discussion on the nature and impact of the assessment herein is presented *infra* 94 *et seq.*

Under such provisions of the charter, the taxes based on that assessment here, unlike real estate taxes, may be collected by suit in assumpsit for the collection of the debt against the person or corporation refusing or neglecting to pay such taxes. (Sec. 26 *supra*.)

This personal liability contrasts sharply with the analysis by Mr. Justice Jackson in Allegheny (p. 184, in 322 U. S.)* of the nature of the assessment against the property there involved:

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*Further analysis of the decision in Allegheny will be presented in connection with the third question of this Brief, *infra*, p. 120.

> "It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used *ad valorem* general property tax. This taxation plan involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment, the application of a uniform rate calculated on the need for public revenues, and the collection, in default of payment, by distraint and sale of the property assessed and taxed. This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures *in rem* than to those *in personam.* While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment."

On our roll, the character of the assessment was fixed rom the beginning to avoid any threat to the sovereignty f the United States. It charged local officials with notice hat there could and should be no interference with funcions of the national government in the premises. In ffect subjection of the property to the statutory lien was arred and the alternative choice of remedy for collection f the tax from appellee was for all practical purposes the ole means of collection.

In view of the foregoing distinctions, the conclusion of he Court below that *Allegheny* is absolute and irrefutable uthority for appellee's claim is unwarranted.

Having examined our contention that the disputed provision in appellee's sub-contract was not fully authorized, we submit that this Court should conclude as follows:

Since all actions of government procurement officers depend on some specific grant of power, the prohibition found in *Sec. 529 of Title 31, U. S. C.* and direction to use the means enacted in Sec. 5 of the *Armed Services Procurement Act* renders the instant partial payment-title passage clause void. It follows that the assessment to appellee on the value of the disputed property must be upheld.

II.

IF INCLUSION OF TITLE TRANSFER PROVISIONS IN APPELLEE'S SUBCONTRACTS WAS AUTHORIZED, DID RELATED CONTRACT TERMS AND THE UNDISPUTED COURSE OF CONDUCT, NEVERTHLESS, ESTABLISH OWNERSHIP IN APPELLEE AND PAPER TITLE IN THE GOVERNMENT?

The lower courts answered "No".
Appellants contend the answer should have been "Yes".

For the purpose of this presentation, appellants assume,

(a) that the Government's contracting agency had legal authority to include partial payment-title vesting clauses in the Government's contracts with Kaiser-Frazer and Curtiss-Wright;

(b) that this authority was broad enough to permit, also, inclusion of such clauses in appellee's subcontracts (to which the Government was not a party*) with said prime contractors; and

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*See disclaimer of obligation or responsibility of the Government at the end of appellee's subcontracts with Kaiser-Frazer and Curtiss-Wright (R. 172 and 221). The instant case is, therefore, clearly distinguishable on the facts from *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. In invalidating the tax in that case, the Court held that the Federal agency there involved had a statutory right to authorize a private, independent contractor to act as an agent of the Government for purchase of property, thereby binding the Government to the payment of the purchase price. Murray, on the other hand, could not bind the Government for any debts incurred (R. 172 and 221).

(c) that these clauses were effective to give to the Government some kind of an interest in the property assessed in this case.

Appellants submit, however, that even under these assumptions appellee retained all of the incidents of ownership in the property, while the Government received only a security or paper title* for financing advanced to appellee.

This fact is borne out by the contract terms themselves, such as the provision that the partial payment clause does not relieve the contractor from risk of loss or destruction, or of damage to property in which title "vests" in the Government; the provision granting Murray rights of acquisition and disposition of the property acquired for purposes of the contract; an unrestricted control, under the contract, over scrap arising out of and under the contract; and the provision for reversion of "title" to Murray upon liquidation of partial payment. This fact is further bolstered by the actions of the parties in carrying out the contract provisions—a course of conduct which clearly indicates an intent by the contracting parties entirely consistent with the theory of appellants.

For the purposes of this section of the brief, appellants also do not question the proposition that absent express Congressional consent, a beneficial interest of the Government in property is exempt from state and local taxation. By the same token, however, it cannot be reasonably disputed that property is subject to such taxation if ownership thereto is vested in someone other than the Gov-

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*The term "paper title" was used in the case of *Offutt Housing Company v. Sarpy*, 351 U. S. 383. It is fully descriptive of the title held by the United States Government in the present case.

ernment and the Government holds merely a security or paper title to such property to secure financing.

We approach the problem, therefore, by an interpretation of the purpose, nature, and legal effect of the partial payment-title vesting clauses contained in Murray's subcontracts.*

Purpose of Partial Payment-Title Vesting Clauses in Government Contracts

The business and industrial structure of the United States is largely built upon credit and financing, and in most instances property is encumbered or pledged as security for the loan or credit extended. Because of its tremendous growth, American industry today finds it economically unfeasible to tie up working capital required for labor, materials and tools necessary for the proper discharge of sizeable contracts. For this reason, it is customary for a contractor to receive interim financial assistance. This is now almost universally true of the aircraft industry whose contracts with the Government, particularly in connection with war effort, has reached staggering proportions.

Provision for partial payments was made in the First War Powers Act of 1941 as amended, as it had been in earlier legislation (hereinbefore fully discussed, pp. 34-35). Inability of many manufacturers to accept and perform Government contracts without financial assistance was a compelling reason for providing such payments. It is so stated in the Report of the Committee on the Judiciary to the United States Senate** in connection with the

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*Partial payment provisions, subsections (a), (b), (c) and (d), Appendix, pages 6a-7a.

**Report No. 911, Senate Misc. Reports IV, U. S. 10546.

Act mentioned. The Committee reasoned that provision for the partial payments "will make it possible to bring the small businessman into the defense program."

Thus, viewed realistically, the partial payment-title vesting provisions are simply a method of financing Government contracts.

The Court's Approach to Tax Questions

In tax cases, this Court has always been concerned with the substance of the relationship involved. The mere formalities of a written instrument which alter tax liabilities have not been permitted to disguise the true nature of the transaction.

This Court said in *Helvering v. F. R. Lazarus and Company* (1939), 308 U. S. 252, 255:

> "In the field of taxation, administrators of the law and the courts are concerned with substance and realities, and formal written documents are not rigidly binding."

Various other cases have readily adopted these principles. In *S. R. A., Inc. v. Minnesota* (1945), 327 U. S. 558, this Court upheld a Minnesota tax on property held by a land contract vendee even though "legal title was retained by the United States for security purposes."

In *Offutt Housing Company v. Sarpy* (1956), 351 U. S. 253, this Court held Nebraska could tax the full value of buildings and improvements held under a 75-year lease from the Federal Government, the Court stating at page 261:

> "Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interest created and so does not solve the

> problem * * * the government may have 'title' but only a paper title. * * *"

Again in the field of income taxation, a similar rule has been accepted by the courts. In *Corliss v. Bowers* (1929), 281 U. S. 376, 378, this Court upheld a statute taxing the income of a revocable trust to the grantee even though legal "title" was in the trust. The Court states:

> "* * * Taxation is not so much concerned with refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

In *Wisconsin Central Railroad Co. v. Price County* (1889), 133 U. S. 496, the appellant was in the process of purchasing certain lands from the U. S. Government. Appellee levied a tax upon these lands prior to the issuance of the patent at a time when legal title was vested in the U. S. Government. This Court stated at page 505:

> "This exception to the general doctrine is founded upon the principle that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation."

The *Wisconsin Central* quotation was cited favorably by the Supreme Court of Nebraska in *Offutt Housing Co. v. Sarpy*, 160 Neb. 320, 70 N. W. 2d 382, 392, where the Court concluded that even though the Government maintained controls over the property in the hands of Offutt and purported to take legal title, it was a "bare legal title" that did not in any manner deprive Offutt of the ownership of its interest.

In *Commissioners v. Court Holding Company*, 324 U. S. 331, the Court, looking through a liquidating dividend of a corporation made under circumstances which would reduce the income tax to the individual stockholders, stated at page 334:

> "The incidence of taxation depends upon the substance of a transaction. * * * To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of tax policies of Congress."

The purport of the foregoing tax decisions clearly is, that the courts would not allow parties by the mere formalities of instruments to defeat the tax claims of the U. S. Government. By the same token, Murray, Kaiser and Curtiss-Wright should not be permitted to use such means to defeat the legitimate tax claims of state or local units of Government. We therefore look beyond the formalities of a single clause of the instrument directly to the substance of the relationship between appellee and the Government. This approach leads us to the logical conclusion that beneficial ownership was in appellee which was, therefore, subject to the personal property tax.

Basic Principles of Ownership

In keeping with the doctrine of substance rather than form, it is a basic principle of law that title and ownership are not necessarily synonymous and that title is often held simply as a means of conferring a lien. Particularly is this true in the area of sales of personalty where a transfer absolute on its face will be deemed a mortgage if intended as such by the parties. *Benton v. Commissioner of Internal Revenue* (1952), 197 Fed. 2d 745, 754.

Brown on *Personal Property,* Section 5, pages 6-7, states:

> "In the legal sense * * * property means not the thing itself, but the rights, which inure in it. Ownership, or the right of property is, moreover, not a single indivisible concept, but a collection or bundle of rights, of legally protected interests. The owner of a given piece of land or chattel has not only the interest of possession, and enjoyment and user, but also that of transfer to another. * * *.
>
> The person to whom the various rights in a thing normally and customarily reside we term the owner thereof. * * *."
>
> "Both in common parlance and in legal acceptation, he is the owner of property who, in the case of its destruction, must sustain the loss of it." *42 Am. Jur.*, page 215, Section 37.

In the instant case the Government exercised ~~no~~ acts of ownership over the property in the hands of appellee, nor did it retain any incidents of ownership in the property covered by the subcontract provisions. Appellee, on the other hand, had full control and possession of the property involved, exercising all the rights of ownership normally attaching to personal property.

Provisions of the Contract Do Not Establish Ownership in the Government

We turn now to an examination of the rights of the parties in the property covered by the subcontract to ascertain whether the Government, in fact, possessed, under the agreements, any of the normal incidents of ownership.

(a) Risk of Loss Provision

The Government specifically provided against and refused to accept any responsibility for risk of loss to the materials in the possession of appellee. Thus, the subcontracts provide:

> "(e) The Article of this contract captioned 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provision hereof" (R. 177).

Appellee clearly showed its control and ownership of the material in its possession by contracting certain insurance policies covering the goods. It is conceded that appellee is named as the sole beneficiary under said policies (R. 83).

It is significant that if the property had been destroyed it necessarily would have had a value in excess of the partial payments. Under the above arrangement, if destruction of the property caused appellee not to perform its obligation, the Government would not be entitled to reimbursement for the value of the property destroyed, but merely to recover its money paid out in the form of partial payments. This is entirely inconsistent with any theory of Government ownership of the property. If the parties had regarded the inventories as Government property, appellee would not have been permitted to handle its insurance in this manner. *U. S. v. Ansonia Brass and Copper Company*, 218 U. S. 452, 466.*

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*In Ansonia, the contract provided that the parts (of the ship, not materials) paid for under the system of partial payments would become thereby the sole property of the U. S. The insurance provision of the contract provided: "Section 212 provided for insurance against fire and marine risks at the contractor's cost, for and on behalf of the U. S. to at least the amount of each partial payment."

In keeping with the principles of insurance law, an insurance contract runs to the person, not to the property, and indemnifies the person or individual who holds a beneficial interest or ownership. (*29 Am. Jur.*, page 47, Section 3.) Since Murray insured the property and named itself as sole beneficiary, it would appear that Murray considered itself the beneficial owner of the property.

The Government was aware that risk of loss fell upon Murray. The provision in the subcontracts relieving the Government from any liability for loss or destruction of the property (R. 177) was approved by a Government contracting officer (R. 86, 178). This indicated not only that Murray felt itself the holder of the beneficial title, but that the Government acquiesced in this view.

The Supreme Court of Wisconsin in *American Motors Corporation and United States of America, Intervenor v. City of Kenosha** (1957), 80 N. W. 2d 363, 274 Wisc. 315, had before it identical partial payment-title vesting clauses as those in the appellee contracts. The Court, speaking of identical risk of loss provisions as those in appellee's subcontracts, states at page 366:

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*The facts of the American Motors case show that on March 27, 1951, the American Motors Corporation entered into a contract with the United States Government, Department of the Air Force, for the manufacture and supply of aircraft engines, repair and replacement of parts, overhaul, tools, test and ground handling equipment and miscellaneous services and equipment in connection therewith. This contract, known as a letter contract, was amended on March 18, 1952, and supplemented on March 29, 1952, by a definitive contract. The definitive contract contains a clause which provides in substance that upon the making of any partial payment, title to all parts, materials, inventories, work in progress and non-durable tools theretofore acquired or produced by the company for the performance of the contract and property chargeable to the contract under sound accounting practice, shall vest in the Government and that title to all like property thereafter acquired or produced by the company for the performance of the contract and properly chargeable as aforesaid shall vest in the Government forthwith upon such acquisition or production.

> "Sub. (e) provides that the Company shall have the complete 'risk of loss or destruction of or damage to property to which title vests in the government under the provisions hereof.' * * *
>
> "As stated in *42 Am. Jur.*, Property:
>
> "'Both in common parlance and in legal acceptation, he is the owner of property who, in case of its destruction, must sustain the loss of it.' Sec. 37, p. 215."

The risk of loss provision provides an important and
ierally accepted indicia of ownership in appellee. Ap-
llee is the owner of the property for, "in the case
its destruction, he must sustain the loss of it."

(b) The Right to Acquire and Dispose of Property

By the provisions of its subcontracts appellee retained
hts to acquire and dispose of the property in its pos-
sion. The Government was interested in the acquisi-
n and disposition of property acquired thereunder for
sole purpose of determining whether the elements of
ts submitted by the prime contractor in its request for
rtial payments were supported by the records of the
contractor.

The partial payment provision of appellee's subcon-
cts, subdivision (d), (R. 175), was identical with that
the American Motors case, *supra*. Subdivision (d) of
partial payments clause provides in part:

> "The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, * * *."

Subdivision (d) of the partial payments clause further provides that the agreed price in the case of acquisition by the company, or the proceeds in the case of disposition, shall be paid or credited to the Government account.

The Supreme Court of Wisconsin in the American Motors decision, *supra,* stated at page 367:

> "The only regulatory control which the Government has over the property with respect to the Company's right to 'acquire and dispose of' it prior to delivery and acceptance, amounts to no more than supervision of the bookkeeping to see to it that the Government is not charged for any of the property so acquired and disposed of. These facts are inconsistent with ownership in the Government."

That the Government control over the Murray subcontracts was no more than a supervision of the bookkeeping is conclusively shown in the present case by stipulated facts which parallel the facts appearing in the Wisconsin American Motors case, *supra.* Stipulation No. 2 (R. 86, 87), states:

> "(4)(a) The United States Air Force representative (i) inspects goods produced by Murray under each subcontract at the Murray plant in Detroit, (ii) audits Murray cost data and approves Murray's requests for partial payments, (iii) participates in Murray's negotiations with the prime contractors on price redetermination and after a redetermined price with the prime contractor is agreed upon the contracting officer assigned to the prime contract approves of such redetermined prices with Murray before they become effective; (iv) approves, through the contracting officer at Murray, any overtime authorized or paid by Murray, and (v) reviews Murray's accounting procedure and periodically spot-checks its figures.
>
> "(b) * * *.

> "(c) All the foregoing in this paragraph is done to effect a clearance for the prime contractor with the Air Force under his prime contract insofar as the goods are produced for use under the prime contracts and payments by the prime contractor to the subcontractor are an element of cost to be cleared by the Air Force when billed therefor by the prime contractor.
>
> "(d) Otherwise, the Air Force has no direct supervision over the subcontractor with respect to the subcontractor's costs."

Such right to acquire and dispose of property (R. 176) are incidents of ownership inconsistent with the passage of absolute title from the appellee to the Government. Appellee has retained the incidents of ownership while the Government has retained security for its advances to appellee.

(c) Unrestricted Control of Scrap

Subdivision (d) of the partial payment provision provides:

> "* * * current production scrap may be sold by the Contractor without approval of the Contracting Officer, but the proceeds will be applied as provided in this paragraph (d), * * *." (R. 176.)

The provisions for the application of the proceeds appearing in paragraph (d) read:

> "* * * the agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. * * *" (R. 176).

Current production scrap may be sold by appellee without approval of the Government. With respect thereto, appellee is the sole judge of what materials shall be scrapped, how much, to whom it shall be sold and for what price, providing only that the proceeds be applied in accordance with the officer's direction.

(d) Provision for Liquidation of Partial Payments

Further evidence of security title in the Government is the provision in the partial payment section of the subcontract, which reads:

> "(d) * * * Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor" (R. 176, 177).

The appellee contended in the lower court that the reason for the inclusion of the partial payment clauses was to secure the Government's control over materials and work in process in the event of a strike or other contingency. But this provision of the contract permits this so-called "Government Title" to revest in the contractor or subcontractor as soon as the Government has been delivered goods equivalent to the value of its investment therein. This would not appear to be the type of clause which the Government Procurement Officers would insert if their real purpose was to secure control of the raw materials and work in process in the hands of the subcontractor. Nor can we assume that the action of the Procurement Officers for the Defense Department was undeliberate. They have dealt with these problems for many years and have a tremendous backlog of experience n this field. The only assumption that can reasonably be made is that they were acting to secure and to protect the interest which they felt needed protection, namely, that of the Government's investment.

Let us consider how this provision works in practical operation. Assuming that the partial payments to appellee represent one-quarter of the total contract price, then as soon as goods equivalent to that valuation were delivered and accepted by the Government, under this provision, the remaining materials, inventories, and work-in-process, still in the hands of Murray or subsequently acquired, which might possess a value far in excess of these partial payments, would be the sole property of appellee. (See *U. S. v. Lennox, infra,* pages 309-310.)

It is immaterial that the contracting parties had not reached the stage in their dealings where "title" would revest in appellee because of liquidation of all partial payments or completion of delivery. As the Wisconsin Supreme Court stated, in the *American Motors* case, *supra,* at page 366:

> "It is immaterial, as set forth in the stipulation of facts, that the company has never acquired or disposed of any of the property as permitted under this clause, *since it is the right of the company thereunder rather than its acts that control.*" (Emphasis added.)

The Government wanted complete aircraft from its prime contractors, and this was its sole objective. It would be difficult to reach any other conclusion in the face of this provision for the liquidation of partial payments inserted by the Procurement Officers which automatically cancels the Government's so-called "title" in these materials upon liquidation of these partial payments.

The identical partial payment-title vesting clause with which we are concerned here has already received interpretation by the Court of Appeals for the Second Circuit in *United States v. Lennox Metals Manufacturing Co.*, 225 F. 2d 302. In that case, the clause appeared in a contract entered into by the Government with Lennox for the manufacture of certain war materials. After making partial payments, the Government withheld further payments requested by Lennox and subsequently declared the contractor to be in default. The Government then filed a suit to recover from Lennox the payments already made and to take from it the property in its hands. It asserted a right to terminate the contract "whenever the contracting officer shall determine that such termination is in the best interest of the Government." Ownership was claimed by the Government, with a right to take the property under the partial payment-title vesting clause.

The appellate court appraised the Government's denial of partial payments to Lennox as wrongful and as precluding the Government from seeking equitable relief. After denying recovery of the partial payments, the court said, with reference to the Government's claim of title to the goods purchased for the purpose of the contract, at page 317:

> "The only other relief sought is, essentially, the enforcement of an equitable lien on defendant's property."

Judge Frank, in a separate concurring opinion, said at pp. 309, 310:

> "At the trial, government counsel conceded that, under the interpretation for which the *government* then *contended, the clause would give the government, upon termination of the contract, title to thousands of dollars of property even if the govern-*

ment had made a partial payment of but $50.00. If this interpretation were correct, then the clause 'set a skillful trap' for the 'unwary' defendant, and 'No such purpose should be attributed to the government. * * *. In construing the document the presumption should be indulged that both parties were acting in good faith.' *Sylvan Crest Sand & Gravel Co. v. United States*, 2 Cir., 150 F. 2d 642, 643. * * * As the government now seeks to construe the contract, it comes close to being ' "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other" '; *accordingly, that construction should be rejected if possible.* See *Hume v. United States*, 132 U. S. 406, 415, 10 S. Ct. 134, 137, 33 L. Ed. 393; *Scott v. United States*, 12 Wall. 443, 445, 20 L. Ed. 438." (Emphasis added.)

(e) Recapitulation

Appellee had the entire "bundle of rights" in the property under its control. It insured the property in its own name, reserved the right to acquire and dispose of materials, reserved to itself the final determination as to what items would be scrapped or reworked without Government approval, and, furthermore, it conducted itself as the owner of the property in its possession.

It is apparent from all the provisions in the contract that the Government was not interested in the specific items contained in appellee's inventories. What it wanted and what it was buying *from its prime contractors* was aircraft assemblies and parts. The raw materials upon which partial payments were requested represented no more than security for the protection of advances made to appellee.

The only possible conclusion that can be drawn from the contract provisions is that security for its financing was intended by the title transfer to the Government. Its obvious purpose was merely to give the Government a hold on materials and work in process as security for moneys paid to the extent, and only to the extent, of such moneys advanced to appellee in the form of partial payments.

Any other conclusion would render meaningless and ineffective the reservations of the partial payment provisions. It would require a strained construction of the entire contract to single out the title passage provision and to ignore the remaining contract terms.

In *American Motors, supra*, the Court reflected on these incidents of ownership in the following language (page 367):

> "In our opinion, the unrestricted right of the Company under the contract to acquire and dispose of the property and the risk of loss are elements of ownership inconsistent with the vesting of such title in the Government as would render the property immune from taxation. Conceding that title was transferred, there was, however, no true transfer of ownership."

We submit that in view of the decision in the above case, as well as in the Lennox case, there is both state and federal court authority supporting appellant's contentions.

We further submit that had the circumstances been somewhat different in this case, even appellee would not dispute our theory of an equitable lien. In the Lennox case, the Government and the contractor were contestants. Here, Murray's position appears to be identical with that of the Government as both seek to avoid the tax. If the Defense Department were to turn upon Murray as it did upon its other comrade-in-arms, who can doubt but that Murray would seek to don the cloak of Lennox, and adopt a theory of equitable lien?

The Conduct of the Parties Was Inconsistent With the Claim of Beneficial Title in the Government

Not only does Murray retain the incidents of ownership under the provisions of this contract, but the parties, by their actions, show that they themselves considered the contract as creating beneficial title in Murray and a security title in the Government. The following facts are pertinent to an examination of this problem.

1. No notice was given to creditors of appellee of the partial payment and transfer of title clause (R. 95, 96).
2. No written documents of any kind pertaining to transfer of title were executed and delivered by appellee to the Government following request for a receipt of partial payment (R. 96).
3. With respect to the tools made by appellee under the subcontracts, there was no delivery to anyone, only inspection and billing for a completed tool by Murray to the prime contractor and by it, in turn, to the Government (R. 95).
4. No change was claimed to have been made by appellee in its accounting procedure or methods after the receipt of partial payments. It was admitted that some materials purchased on other defense contracts, to which no claim of governmental title was subsequently urged, were kept in the same account as the property assessed (R. 96).
5. In its published annual report in 1951, moreover, appellee did not make reference to a sum of $125,000 as a segregated item of accounts, receivable

under the subcontract in question. This amo
represented the total partial payment requ
submitted before August 31, 1951, on which p
ments were received later that same year (R.

6. Appellee made no change in its physical treatm
of the property assessed after the request for
receipt of partial payments. In this connect
appellee claimed to treat the property from
very beginning as it did after receiving its f
partial payment (R. 98).

7. No deliveries of completed parts or sub-assembl
manufactured by Murray had been made to eit
Kaiser or to Curtiss-Wright on January 1, 1
(R. 52).

8. The power to determine whether rejected ite
should be reworked or disposed of as scrap
left to appellee's employees (R. 98).

9. The billing of completed items which appel
was to manufacture and deliver was handled
the usual manner, naming the subcontractor
consignor and the principal contractor as c
signee, with no indication that goods being sh
ped were the property of the Government (de
sition Exhibits 3 and 4). The same procedu
was used in disposal of scrap (deposition E
hibits 9 and 10).

10. Although some inspection was made by a G
ernment officer of sub-assemblies at the appelle
plant, nevertheless, the provisions of the pri
contracts in both instances called for final
spection and delivery to the United States G
ernment of the aircraft by the contractor—in t
case of Kaiser at its airfield at Willow R

Michigan, and in the case of Wright, F. O. B. Carriers' Equipment at the plant or plants of the latter (R. 88, 89).

11. Appellee alone was named as the beneficiary under its insurance policies in force on January 1, 1952, on all the personal property in question (R. 83).

In *Offutt Housing v. Sarpy*, 351 U. S. 252 (1955), the Government leased to appellant for 75 years land located on an air force base. Appellees constructed certain buildings on the property which had a useful life of 35 years. The Government prescribed maximum rents, selected occupants, and had a voting interest in appellant corporation. At the time when the buildings were erected title to all buildings and property vested in the Government pursuant to the terms of the agreement between the Government and Offutt.

This Court, in holding these properties taxable to the appellant, stated at page 261:

> "The lease is for 75 years; the buildings and improvements have an estimated useful life of 35 years. The enjoyment of the entire worth of the buildings and improvements will therefore be petitioner's. * * * The Government may have 'title', *but only a paper title*, and, while it retained the controls described in the lease as a regulatory mechanism to prevent the ordinary operation of unbridled economic forces, this does not mean that the value of the buildings and improvements should thereby be partially allocated to it." (Emphasis added.)

Applying these facts to the case at bar, we find that the terminology of a clause does not resolve the issue if the contract provisions and the conduct of the parties are not

consistent therewith. The Court is not precluded from a
certaining the real interests of the parties.

The language of the partial payment-title vesting clau
in the contracts in dispute, though seemingly unambiguou
is not determinative of the rights of appellee or the Go
ernment.

As Justice Holmes so aptly stated in *Towne v. Eisne*
245 U. S. 417, at page 425:

> "A word is not a crystal, transparent and u
> changed; it is the skin of a living thought an
> may vary greatly in color and content according
> the circumstances and the time in which it is used.

Looking beyond the bare bones of the word "title"
the circumstances surrounding the performance of th
contract, we find here as in Offutt that the acts of th
parties were inconsistent with the claim of title, and th
the purported transfer of "title" accomplished nothin
more than to establish a lien for moneys advanced. A
pellee has retained not only the entire "bundle of rights
normally incident to ownership, but has in practice treate
the property as its own.

Army Regulations Treat Payments, Whether Partial, Progress or Advance, as Method of Financing

Further corroborative evidence that all types of a
vancements, whether partial, progress or advance pa
ments, are fundamentally regarded as methods of finan
ing, is found in Army Regulations. For example, Depar
ment of Defense Draft No. 7800-1 (October 30, 1953),
C. C. H. Government Contracts Rep. paragraph 8017, co
mences with these words:

> "The purpose of this directive is to establis
> basic contract financing policy for the Departme
> of Defense to assure proper uniformity in policie

> procedures, and forms, and to provide for application of the fundamental management principle of internal check and balance.
>
> "The term 'financing' as used in this directive covers government guaranteed loans, advance payments, and progress payments (not including partial payments for delivery of one or more completed units called for under a contract) necessary for both performance and termination purposes, to the extent authorized by law (insofar as progress payments are concerned, it is contemplated that contract financing officers will participate in the development of appropriate standard contract provisions designed to avoid undue risk to the Government and would participate only in specific cases involving unusual financial arrangements and conditions).
>
> "Financing must support procurement and should be designed to aid not impede essential procurement, but should be so administered as to avoid the risk of monetary loss to the Government to the extent compatible with aiding essential procurement. * * *."

It is somewhat significant that this same rationale was adopted under the Contract Settlement Act of 1944, 41 U. S. C. A. Section 10, *et seq.*, where these various types of advancements are again lumped together as methods of "interim financing." *2 C. C. H. Government Contracts Rep.*, paragraph 40.036.

Title 41 U. S. C. A., Section 103(i), reads:

> "The term 'interim financing' includes advance payments, partial payments, loans, discounts, advances, and commitments in connection therewith and guarantees of loans, discounts, advances, and commitments in connection therewith and any other type of financing made in contemplation of or related to termination of war contracts."

Under large procurement contracts, either for the Go
ernment or for private industry, a considerable "lea
time* usually elapses between commencement of wo
under the contract and the delivery of completed uni
As the above quoted regulations clearly recognize, fe
contractors are in a financial position to supply and t
up working capital which is required during this peri
for labor, materials, and tooling needed for producti
under the contract.

Further support for our contention that the Governme
was primarily interested in security for its advances
found in the *Manual for Control of Government Prope*
in possession of contractors (May 1, 1951), 1A C. C.
Government Contracts Rep., paragraph 29.753, which co
tains this definition of the term "Government Property

> "(c) *Government property* means all proper
> owned by or leased to the Government, includi
> property acquired by the Government under t
> terms of a contract; except that *property to whi
> the Government has acquired a lien or title sol
> as a result of partial, advance or progress pa
> ments shall not for the purpose of this Manual
> classified as Government property.* With this e
> ception, Government property includes both Go
> ernment-furnished property and contractor-a
> quired property as defined below:
>
> "(i) *Government-furnished property* is pro
> erty in the possession of or acquired directly
> the Government and delivered or otherwise ma
> available to the contractor; and
>
> "(ii) *Contractor-acquired property* is proper
> procured or otherwise provided by the contract

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*Appellee entered into its contracts on March 23, 1951 (R. 40), a
April 19, 1951 (R. 46), respectively, and had not at the date of asse
ment, January 1, 1952, delivered any completed units to their prime c
tractors, Curtiss-Wright or Kaiser-Frasier Corporation (R. 95).

> for the performance of a contract, pursuant to the terms of which title is vested in the Government." (Emphasis added.)

This regulation governs the handling of Government property while in the physical possession of contractors and subcontractors. By the terms of the regulation, the Government did not intend to be, nor did it regard itself as really "owning" this sort of property.

There would be no reason for the exception of materials such as those acquired by Murray from the general class of "Government property" if the Government considered itself as having beneficial title thereto. The only reason for making a special classification of property held as a result of partial, advance or progress payments would be that in these cases the Government does not have the same type of interest therein that it has in the balance of its personal property.

It must be acknowledged that the Government has a beneficial interest in its personal property, and can make regulations for its control. If the above quoted regulation relieves raw materials acquired in this manner from the prescriptions imposed upon Government property, it follows that the Government did not consider itself possessed of beneficial title therein.

Summation

To borrow the words of this Court in *Griffiths v. Commissioner* (1939), 308 U. S. 355, 357:

> "A lawyer's ingenuity devised a technically elegant arrangement * * *."

which did not change the true nature of the transaction.

The inclusion of a single clause in a subcontract providing for the vesting of "title" should not be construed to pass a beneficial title, where the creation of such title is inconsistent with the contract.

The theory of appellee ignores the fact that in tax cases courts disregard formalities. A narrow construction limited to only one clause of this contract would require the Court to disregard the provisions of the contract dealing with risk of loss, the right to acquire and dispose of property, the unrestricted control of scrap, and the liquidation of all partial payments. Under such a construction, the conduct of the parties, which recognizes the "bundle of rights" in Murray growing out of the contract provisions, must also be totally ignored.

When the contract provisions are interpreted as vesting beneficial ownership in Murray, they become fully meaningful and can be reconciled with the conduct of the parties. The Government's financial interest is fully protected with a prior lien. Such an approach leads logically, without strained construction, to the conclusion that the "title" of the Government was essentially an equitable lien on appellee's property. *U. S. v. Lennox Metal Manufacturing Co., supra.*

Thus, Murray, having beneficial ownership, is subject to the local personal property taxes levied by the City of Detroit and the County of Wayne.

III.

ARE THESE STATE AND LOCAL LAWS AND NON-DISCRIMINATORY TAXES LEVIED THEREUNDER VALID NEVERTHLESS AS IMPOSING NO DIRECT BURDEN ON THE FEDERAL GOVERNMENT IN VIOLATION OF ITS IMPLIED CONSTITUTIONAL IMMUNITY?

The Lower Court answered "No."
Appellants contend the answer should be "Yes."

A. Doctrine of Implied Constitutional Immunity

The doctrine of implied constitutional immunity of the Government from taxation or control by the States was originally propounded by Chief Justice Marshall in *M'Culloch v. Maryland*, in 1819, 4 Wheat. 579. This rule and the basic theory back of the direct burden or incidence test as now applied by this Court in determining the validity of local taxes when the Federal government as its property or institution is involved were first enunciated by Chief Justice Marshall in *M'Culloch v. Maryland.* What Chief Justice Marshall said was that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

The Chief Justice, in arriving at the above-quoted conclusion, had, earlier in his opinion, laid down a rule which he felt should be followed in determining the implied immunity of the Federal Government, under the Constitution, from taxation by the States, in the following language (p. 607):

> "If we measure the power of taxation residing in a state, by the extent of sovereignty which the peo-

> ple of a single state possess, and can confer on it government, we have an intelligible standard, applicable to every case to which the power may b applied. We have a principle which leaves th power of taxing the people and property of a stat unimpaired; which leaves to a state the comman of all its resources, and which places beyond it reach, all those powers which are conferred by th people of the United States on the government o the Union, and all those means which are given fo the purpose of carrying those powers into execution. We have a principle which is safe for th states, and safe for the Union. We are relieve as we ought to be, from clashing sovereignty; fro interfering powers; from a repugnancy between right in one government to pull down what there i an acknowledged right in another to build up; fro the incompatibility of a right in one government t destroy what there is a right in another to preserve. We are not driven to the perplexing inquir so unfit for the judicial department, what degr of taxation is the legitimate use, and what degre may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpatio of a power which the people of a single state cann give.
>
> *We find, then, on just theory, a total failure o this original right to tax the means employed b the government of the Union, for the execution o its powers.*" (Italics ours.)

The State of Maryland and other States at that tim were fearful of Federal power and felt that the expansio of the United States Bank's activities into their Stat was but a prelude to other and greater expansions of Fe eral activities and controls over local functions and activ ties, including slavery. The major issue in that case wa not the tax involved but the question of the validity of the Act of Congress creating the Bank of the United States. Chief Justice Marshall and the entire Court were subjected to abuse and criticism for a long time after that decision and demands were made for removal of the entire bench. The Chief Justice was well aware of the cold war which had been going on between the States and the Federal Government for a long time previous to his decision and it was further impressed upon him and the rest of the Court by the learned lawyers who argued the cause for nine days.*

Against that background and knowing well the purpose of the tax before him, as well as other similar taxes then being levied, such as the one in his home State of Virginia (a $50,000 annual tax on each United States Bank Branch) the Chief Justice was impelled, in the interests of protecting the Federal Government from its avowed enemies, to strike down this frank attempt to destroy an agency of that Government.*

Chief Justice Marshall, however, feeling that possibly too broad an interpretation might be made of the rule he laid down, recited circumstances under which taxes on the bank would be valid (p. 609, 4 Wheat.):

> "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax laid upon the real property of the bank within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instru-

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*See "The Life of John Marshall" by Albert J. Beveridge, Vol. IV, Chap. VI.

> ment employed by the government of the Uni
> to carry its powers into execution. Such a tax mu
> be unconstitutional."

See: *Union Pacific R. R. v. Peniston*, 85 U. S. 787, 7
and
Thomson v. Union Pacific R. R., 76 U. S. 792, 7

It should be noted that even though he found the ba
to be a government institution, he considered a non-d
criminatory tax on its property no threat to the gove
ment.

The exceptions he made were as to uniform or non-d
criminatory taxes on property or stock of the bank wh
would not have been the same as taxes, as he phrased
upon the "means employed by the government in carryi
out its operations." The language of Justice Marsh
oft-quoted, that "the power to tax is the power to
stroy" should be read in the light of the facts in that ca
to which he applied it, namely, as to a discriminatory
(or as Wm. Pinckney, who argued the cause for the ba
put it, a "political" tax*), rather than a non-discrimi
tory tax and, also, consideration should be given to
source from which it was derived. The phrase first

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*4 Wheat. p. 598:

"But this tax is leveled exclusively at the branch of the Un
States Bank established in Maryland. There is, in point of fac
branch of no other bank within that state, and there can legally
no other. It is a fundamental article of the state constitution
Maryland, that taxes shall operate on all the citizens impartia
and uniformally, in proportion to their property, with the except
however, of taxes laid for political purposes. This is a tax laid
a political purpose; for the purpose of destroying a great institut
of the national government; and if it were not imposed for that
pose, it would be repugnant to the state constitution, as not being
uniformly on all the citizens, in proportion to their property."

peared in the argument made by Pinckney, who said (4 Wheat., p. 598):

> "The power to tax, *without limit or control, is the power to destroy.*" (Emphasis supplied.)

Guiding Principles and Limitations of Immunity Doctrine

In 1869 the Court interpreted and applied the limitations of the Marshall doctrine and again warned of attempts to extend the principle *Thomson, et al. v. The Union Pacific Railroad Company*, 76 U. S. 792 at p. 798.

> "It is unquestionably true that the court (in *M'Culloch v. Maryland*) in determining the second general question (the validity of the tax) already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation (by) the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers and functions. It did not owe its existence, or any of its qualities, to state legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.
>
> In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The state tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition that needs no argument to support

it. And the same reasoning will apply to instruments of the government, created by itself for publi and constitutional ends. But we are not aware o any case in which the real estate, or other propert of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence o express legislation to that effect, to just contribution, in common with other property, to the genera expenditure for the common benefit, because of th employment of the corporation in the service of th government.

It is true that some of the reasoning in the case o *M'Culloch v. Maryland,* seems to favor the broade doctrine. But the decision itself is limited to th case of the bank, as a corporation created by a la of the United States, and responsible, in the use o its franchises, to the Government of the Unite States.

And even in respect to corporations organized under the legislation of Congress, we have alread held, at this term, that the implied limitation upo state taxation, derived from the express permissio to tax shares in the national banking associations, i to be so construed as not to embarrass the impos tion or collection of state taxes to the extent of th permission fairly and liberally interpreted. *Ban of Louisville v. Kentucky* (76 U. S. 701); *Lionberge v. Rowse* (76 U. S. 721).

We do not think ourselves warranted, therefor in extending the exemption established by the cas of *M'Culloch v. Maryland,* beyond its terms. W cannot apply it to the case of a corporation derivin its existence from state law, exercising its franchis under state law, and holding its property withi state jurisdiction and under state protection.

We do not doubt the propriety or the necessit under the Constitution, of maintaining the supremacy of the General Government within its constitu tional sphere. We fully recognize the soundness of the doctrine, that no State has a 'right to tax the means employed by the Government of the Union for the execution of its powers.' But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally taxation of the means.

No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection. *Lane County v. Oregon* (*ante* (74 U. S.) 101, 105); *Bank v. Kentucky* (*ante* (76 U. S.) 701).

We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of, mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments."

And in 1873 in *Union Pacific R. R. v. Peniston*, 85 U.
787, 791, 795, this Court interpreted both *M'Culloch* an
Thomson, above as proscribing taxes, the direct effect
which was to hinder the exercise of the powers of the Go
ernment and approving taxes which only remotely affe
the efficient exercise of Federal powers. At page 791 (
U. S.), the Court said:

> "While it is true that government cannot exerci
> its power of taxation so as to destroy the state go
> ernments, or embarrass their lawful action, it
> equally true that the States may not levy taxes t
> direct effect of which shall be to hinder the exerci
> of any powers which belong to the National Gover
> ment. The Constitution contemplates that none
> those powers may be restrained by state legislatio
> But it is often a difficult question whether a tax im
> posed by a State does in fact invade the domain
> the General Government, or interfere with its opera
> tions to such an extent, or in such manner, as t
> render it unwarranted. It cannot be that a sta
> tax which remotely affects the efficient exercise
> a federal power is for that reason alone inhibite
> by the Constitution. To hold that would be to den
> to the States all power to tax persons or propert
> Every tax levied by a State withdraws from th
> reach of federal taxation a portion of the propert
> from which it is taken, and to that extent diminish
> the subject upon which federal taxes may be lai
> The states are, and they must ever be, co-existan
> with the National Government. Neither may d
> stroy the other. Hence the Federal Constitutio
> must receive a practical construction. Its limit
> tions and its implied prohibitions must not be e
> tended so far as to destroy the necessary powers
> the States, or prevent their efficient exercise.
>
> "All state taxation which does not impair th
> agent's efficiency in the discharge of his duties t
> the government has been sustained when challenge

> and a tax upon his property generally has not been regarded as beyond the power of a State to impose. In *BK v. Ky.*, 9 Wall. 353 (76 U. S. XIX, 701), when the right to tax national banks was under consideration, it was asserted by us that the doctrine cannot be maintained that banks, or other corporations or instrumentalities of the government, are to be wholly withdrawn from the operation of state legislation. Yet it was conceded that the agencies of the Federal Government are uncontrollable by state legislation, so far as it may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.
>
> "It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they are intended to serve it, or does hinder the efficienct exercise of their power."

Both the *Thomson* and *Peniston* statements of the basic principles of immunity and its limitations, as above quoted, and as reasserted in *Willcuts v. Bunn*, 282 U. S. 216, and *Metcalf v. Mitchell*, 269 U. S. 523, were used by Chief Justice Hughes in *James v. Dravo*, 302 U. S. 134 (followed since by such cases as *Esso Standard Oil v. Evans*, 345 U. S. 495; *Graves v. New York*, 306 U. S. 466; *Helvering v. Mountain Producers*, 303 U. S. 376; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma Tax Com. v. Texas Co.*, 336 U. S. 342; *S. R. A. v. Minnesota*, 327 U. S. 558; *Smith v. Davis*, 323 U. S. 111, among others) as the basis for the Court's adoption of the modern version of the rule that if the direct burden or incidence of the tax is not on the Government and the taxation does not in any substantial way interfere with the performance of federal functions but the effect is only remote, then it should be valid.

While the *Thomson* and *Peniston opinions* declared that the limitations or exceptions to the application of the general principles of immunity as pronounced by Chief Justice Marshall should be observed and taxes which were not directly on and only remotely interfered with the operations of the Government should be valid, later decisions of this Court have disregarded those limitations and invalidated a great number of taxes only remotely affecting the United States, principally economically. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218;* *Indian Motorcycle v. United States*, 283 U. S. 570; *Graves v. Texas Co.*, 298 U. S. 303; *Gillespie v. Oklahoma*, 257 U. S. 501; *Roger v. Graves*, 299 U. S. 401, *et al.*

But the extensions of the doctrine of immunity by these decisions have either expressly or impliedly been overruled by the reassertion of the limitations expressed in

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*Justice Holmes, dissenting with Justices Brandeis and Stone, in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223-226, declared the power of this Court to prevent attempts to levy destructive taxes:

> "But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one.
>
> To come down more closely to the question before us, when the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the state that makes the business possible is just as necessary an element in the cost of production as labor or coal. * * *"

the *M'Culloch, Thomson* and *Peniston cases* (heretofore discussed) in the opinions and decisions of *Dravo; Graves v. New York; Helvering v. Mountain Producers; Alabama v. King & Boozer; Esso v. Evans; Oklahoma Tax Com. v. Texas Co., supra,* among others. Since 1937, when *Dravo* was decided, this Court has maintained an interpretation and application of the immunity principle in conformity with *M'Culloch, Thomson* and *Peniston* validating taxes not directly imposed on the Government or its institutions and only remotely affecting Government functions and in doing so has regarded the substance and direct effect of the tax, not the form, type or label as determinative of its incidence.

In other words, this Court has restored the fundamental principles of true inter-governmental immunity and its limitations. In *James v. Dravo*, 302 U. S. 134, 150, 153-156 Chief Justice Hughes said:

> "We said (in *Willcuts v. Bunn*, 282 U. S. 216, 225): 'The power to tax is no less essential than the power to borrow money, and, in preserving the latter it is not necessary to cripple the former by extending the constitutional exemption of taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' * * *"
>
> "Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor, in performing services for the United States. 'Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally,

taxation of the means.' *Thomson v. Union P. I*
Co., 9 Wall. 579, 597, 19 L. ed., (76 U. S.) 792, 79

“In *Union Pacific R. R. v. Peniston*, 18 Wall.
(85 U. S. 787, 791, 795) the Court said: 'It is, ther
fore, manifest that exemption of Federal agenci
from State taxation is dependent, not upon th
nature of the agents, or upon the mode of their co
stitution, or upon the fact that they are agents, bu
upon the effect of the tax; that is, upon the questio
whether the tax does in truth deprive them of pow
to serve the government as they were intended t
serve it, or does hinder the efficient exercise of the
power. A tax upon their property has no su
necessary effect. It leaves them free to dischar
the duties they have undertaken to perform. A ta
upon their operations is a direct obstruction to th
exercise of Federal powers.'

(And from the dissenting opinion of Justic
Bradley in the Peniston case the Court quotes a
pertinent): “ 'wherein (when) the government e
ters into a contract with an individual or corpor
tion to perform services necessary for carrying o
the functions of government—as for carrying th
mails, or troops or supplies, or for building ships o
works for government use. (In those cases) the gov
ernment has no further concern with the contract
than in his contract and its execution. It has n
concern with his property or his faculties indepen
ent of that. How much he may be taxed by, or wha
duties he may be obliged to perform towards, hi
State is of no consequence to the government, s
long as his contract and its execution are not inte
fered with. In that case the contract is the mea
employed for carrying into execution the powers
the government, and the contract alone, and not th
contractor, is exempt from taxation or other inte
ference by the State government.

“Taxation by either the state or the federal g
ernment affects in some measure the cost of ope

> tion of the other. As 'neither government may destroy the other, or control in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * or the appropriate exercise of the functions of the government affected by it.' *Metcalf v. Mitchell, supra,* (269 U. S. 523, 524.)

The Court was aided in *Dravo* in its reversal of the previous broad interpretation of immunity, by the excellent brief of the then Solicitor General, Stanley Reed (now retired Justice Reed) and the then Attorney General Homer Cummings, who filed a brief *amicus curiae* which advocated that (at pages 3, 25, 44):

> "We ask, therefore, that this Court permit those who contract with the Government to be subjected to the normal tax burdens of those who contract with private persons. The validity of the tax should be tested only by the presence or absence of a discrimination against those dealing with the sovereign. And the decisions of this Court indicate the readiness with which the sovereign can obtain protection against a discriminatory tax, which alone contains any threat to our dual system of government."
>
> "The exemption of contractors would ordinarily be reflected in savings to the United States, so that the United States would be able to purchase a contractor's services at less cost than could any private person. The question thus becomes whether the maintenance of our dual system requires that those who do business with the Federal Government should be exempt from a general tax, there-

by in effect obtaining free benefits from the State, in order that those free benefits may be passed on to the Federal Government. We think the question bears its own answer."

"We think it evident that once we pass beyond the simple criterion of whether or not the Government itself must pay the (non-distriminatory) tax and subject itself to the tax collection machinery o the State, there can be no satisfactory distinction between the types of taxes which are sought to be imposed upon the private persons who deal with the sovereign. Since the question turns solely upon the effect upon the sovereign, and since all taxes, i varying degrees, have this effect, we submit tha the doctrine can have a rational and fair applicatio only if all of these taxes are held to be within th taxing power of the Government, whether it be th Nation or the State. The attempt to distinguis between the varying types of taxes imposed o private persons, according as they interfere wit the sovereign, is to perpetuate a rule which ha proved to be unsatisfactory and inconsistent."

And again this Court in its opinion and the concurrin opinion of Justice Frankfurter, in *Graves v. New Yor supra*, 306 U. S. 466, 483, reasserted guiding principles o and limitations of the implied immunity doctrine:

> "* * * in Helvering v. Mountain Producer Corp., 303 U. S. 376, 82 L. Ed. 907, 58 S. Ct. 62 supra, * * * It was pointed out that the implie immunity of one government and its agencies fro taxation by the other should, as a principle of constitutional construction, be narrowly restricte For the expansion of the immunity of the on government correspondingly curtails the sovereig power of the other to tax, and where that immunit is invoked by the private citizen it tends to opera for his benefit at the expense of the taxing government and without corresponding benefit to the go

ernment in whose name the immunity is claimed. See *Metcalf & Eddy v. Mitchell, supra* (269 U. S. 523, 524, 70 L. Ed. 392, 393, 46 S. Ct. 172); *James v. Dravo Contracting Co., supra* (302 U. S. 156-158, 82 L. Ed. 170, 171, 58 S. Ct. 208, 114 A. L. R. 318)."

At pp. 488-491, (Justice Frankfurter concurring):

"Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, rested, had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *M'Culloch v. Maryland*. Partly as a flourish in rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' Id. at p. 431. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion of *M'Culloch v. Maryland*.

> All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218, 223, 72 L. Ed. 857, 859, 48 S. Ct. 451, 56 A. L. R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent. * * * In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined."

And in *Oklahoma Tax Commission v. Texas Co., supra,* 336 U. S. 342, 363-366, this Court further emphasized the correct application of the immunity doctrine as being concerned with substance and direct effects and not with merely theoretical conceptions of the interference with the function of Government.

> "Moreover the burdens of the taxes here, if any of a character likely to interfere with respondents in carrying out the terms of their leases, are as appropriately to be judged by 'regard * * * to substance and direct effects,' and as inappropriately to be determined 'by merely theoretical conceptions of interference with the functions of government,' were those in the Mountain Producers Case.

> The Mountain Producers Case *(Helvering v. Mountain Producers, supra)* was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.
>
> Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

Two opinions of this Court since *Dravo*, that is, *United States v. Allegheny County*, 322 U. S. 174 and *Kern-Limerick v. Scurlock*, 347 U. S. 110, are, in our humble opinion, out of harmony with the correct principles of and limitations laid down by *M'Culloch, Thomson, Peniston, Dravo* and the other decisions heretofore discussed and cannot be distinguished on principle from these cases, although this Court has made distinctions such as in *Esso* which upon analysis are purely technical distinctions having no relation to the fundamental principles of immunity. We will show that the facts in this case also distinguish it from *Allegheny* and *Kern-Limerick* but we contend that these taxes should be validated not only for that reason but also because they are within the limitations of the correct immunity philosophy, as expressed in the cases heretofore discussed.

Contract Created Immunity Not in Accord With Fundamental Principle

In considering the tax here involved, a distinction should be made between the traditional constitutional tax immunity of the Government and the immunity here attempted to be created by contractual language alone.

The fundamental principle of immunity exists independent of contract and is implied because any tax levied directly upon the Government, its institutions or its property is a direct imposition against the sovereign, the incidence of such a levy falling on the United States and not on a private individual or corporation.

The contract-created-immunity here claimed is an artifice and could not exist independent of language devised in most instances for the sole purpose of creating an immunity theretofore non-existent (either by implication or Congressional Act).

The question here, as in *Dravo, King and Boozer,* etc. is: Is the direct burden or legal incidence of the tax in this case, within the doctrine of implied constitutional immunity, upon the Government or upon the independent contractor? In answering that question the nature and impact of the tax, the liability or responsibility for payment thereof, the protection of any Government interests involved as well as whether or not the substance and direct effect of this tax constitute an interference with any means of Government operations, are pertinent.

B. Nature and Impact of the Tax

On January 1, 1952 appellee had in its possession personal property of the value of $12,183,180 (of which value $2,043,670, it is here claimed, represented property of the United States). Appellee was listed on a personal prop erty assessment roll (Appendix, p. 29a) R. 103 as the "owner or taxpayer" under the provisions of the *Detroit Charter* and *State Law (Compiled Laws of Michigan, 1948, Sec. 211.1 et seq.* Appendix p. 9a), which *Charter* in its pertinent parts, provides (*Title VI, Chapter II*):

> "Section 1. All real and personal property with in the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. * * * All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not."

> "Sec. 7. After the assessment rolls shall have been fully and finally confirmed, it shall, as herein provided, be the duty of the board of assessors to cause the amount of all taxes, in dollars and cents, authorized to be assessed and collected in each year, to be ratably assessed to each person named or lots described, upon and according to the aggregate valuation which such person or lots shall have been assessed in said assessment rolls. Such ratable assessment shall be entered in a book prepared for that purpose to be known as the tax roll for each district, in a column showing the amount of city taxes assessed to each person or lot in each year. Such tax rolls shall contain columns for the names and addresses of all persons assessed hereunder. When said tax rolls shall have been completed, the board shall deliver the same to the controller, who shall cause the same to be delivered to the city treasurer on the first day of July, take his receipt therefor and charge him therewith. All city taxes shall become a debt against the owner from the time of the listing of property for assessment by the board of assessors."

Section 1, Chapter IV, Title VI of the Charter of the City of Detroit, provides:

> "All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed. The owners or occupants or parties in interest to any real estate assessed hereunder shall be liable to pay such taxes, and all assessments levied in accordance herewith. The owners or persons in possession of any personal property shall pay all taxes assessed thereon."

Procedure for Assessment and Levy of Personal Property Tax Under Charter, Etc.

The substance of the procedure under the *Charter* and *State law* in the levy of a personal property tax is to lay (levy) a tax on the owner or person in possession (the taxpayer named on the roll, in this instance, the appellee) of personal property. (Sec. 7, Ch. II, Title VI, Charter above.) This contrasts with procedure for levy of an ad valorem real property tax condemned in *United States v. Allegheny*, 322 U. S. 174, as laying a tax on Government property.

The first step in our assessment-taxation process unde the *Charter* and comparable *State laws* is an assessmen (valuation or appraisal) of the property owned or in th possession of the taxpayer, at its true cash value as provided in *Section 1, Chapter II, Title VI of the Charte* above. The word "assessment" as there used means th appraisal or valuation.

This listing and valuing is only the first step and i itself fixes no liability and lays no charge upon either person or property but is preliminary to and serves as a essential basis for the apportionment or levy of a personal property tax to obtain from the taxpayer name which here is appellee, its proportionate share of the pub lic revenues required to be raised by taxation by the City and County.

In *Flanigan v. Police Jury*, 82 So. 722, the Supreme Court of Louisiana said at page 726:

> "* * * The words 'assess' and 'assessment' have a broad or narrow meaning according to the sense or connection in which they are used. Sometimes they mean a listing and valuing of property, while at others they include the calculation of the rate and amount of taxes thereon. In the present case we believe that by 'assessed valuation' the framers of the Constitution meant only the listing and valuing of the property as a basis upon which taxes were to be collected, and that they did not intend to include in that term the further process of the calculation of the amount to be paid by the taxpayers. In other words, the value written into the roll by the assessor to represent the property, and the one factor in the process of taxation which remains constant for all purposes, save to the extent that it may be modified by the police jury as a board of reviewers, or by the board of state affairs, in the exercise of its powers of review, is the actual value fixed by the board."

Cooley on Taxation, Vol. 1, 4th Ed., Section 24, reads as follows (p. 93):

> "The individual and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time stipulated by law."

In *Cooley on Taxation*, Vol. 3, 4th Ed., Sec. 1044, the word "assessment" is defined:

> "The word 'assessment,' as used in the decisions and statutes, has various meanings. Properly

speaking it does not include the levy of taxes although sometimes the words 'assess,' 'assessed,' or 'assessment' are usea in a statute as including both the levy and the assessment. An assessment, strictly speaking, is an official estimate of the sums which are to constitutee the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not, therefore, of itself lay the charge upon either person or property, but it is a step prelimicary thereto, and which is essential to the apportionment. * * *"

Personal Property Tax Is Charge Against Person Named on Roll

Only the procedure in *Section 7, Chapter II, Title VI of the Charter* above fixes liability and makes the charge or levy of the tax when the tax roll is certified and the amounts of all taxes are ratably assessed upon and according to the aggregate valuation *which such person* (or lots) *shall have been assessed* in said assessment rolls.

The tax charge or levy is here made or fixed to or against the person named in the assessment roll in the case of personal property assessments and to or against the lots, in the case of real property, described in said assessment roll.*

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*In *Kelly v. Herrall*, 20 Fed. 364, the Court said at page 367:

"In Cooley, Tax'n, the learned author (383, note) suggests that too much importance has been attached to this idea that a proceeding for the assessment and levy of a tax is 'hostile' to the tax-payer, and adds the following judicious and sensible comments:

'The proceedings in the assessment of a tax are not, in an proper sense, hostile to the citizen. They are, on the other hand proceedings necessary and indispensable to the determination o the exact share which each resident or property owner ought t take, and may and ought to be supposed desirous of taking, i

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Only in *Section 7, Ch. II, Title VI of the Charter* above is the individual tax obligation fixed, and made a charge upon the person in the case of personal property taxes and upon the lots in the case of real property taxes being otherwise inchoate and for an undetermined amount prior thereto *(The West Michigan Lumber Co. v. James Dean,* 73 Mich 459, 41 N. W. 503.**

(Continued from preceding page)

> meeting the public necessity for a revenue; procedings which the willingness of the tax-payer cannot dispense with, and which only become hostile when the duty to pay, once fixed, fails to be performed by payment. Then, and then only, do the steps taken by the government assume a compulsory form. Until then, the reasonable presumption is that government and tax-payer will act together in harmony, and that the latter will meet his obligation to pay as son as the former has performed its duty in determining the share to be paid.' "

It would appear that the Courts have attached too much importance to the mere proceedings for assessment in transmuting that alone into hostile action against the government, according to Justice Cooley.

**In *The West Michigan Lumber Company v. James Dean,* the Court said:

> "The statute (Act No. 153, Laws of 1885, §26) provides that the supervisor, after the roll has been certified as directed by the board of supervisors, shall proceed to assess the taxes apportioned to his township, and extend the same on his roll, and the taxes thus assessed shall become at once a debt to the township from the persons to whom they are assessed; and all personal taxes shall also be a lien on all personal property of such persons so assessed from and after December 1, except where such property is sold in the regular course of business.
>
> The next section then provides that the supervisor shall prepare a copy of the assessment roll, with the taxes assessed as thereinbefore provided, and annex thereto a warrant signed by him, commanding the township treasurer to collect the taxes; and this warrant authorizes the treasurer, in case of neglect or refusal of any person assessed to pay, to seize the goods and chattels of such person, and sell the same therefor. The copy of the roll, with the warrant

(Continued on next page)

Significantly the language of *Section 7* indicates a distinction between liability for taxes in the case of personal property as opposed to real property. The assessment or apportionment is to the person in the case of personal property and to the lots in the case of real property. Also the tax roll is required to have a column showing the amount of city taxes assessed or levied to each person or lot in each year. This confirms our conclusion that the form and substance of our personal property tax is essentially a form of personal taxation, using the property only as a basis according to value for such taxation. See *Opinions, Attorney General of Michigan,** 1928-30, p. 176 at p. 177:

> "In considering these provisions it should be borne in mind that a personal property tax is distinguished from a real estate tax in that the former is an assessment against the person, while the latter is against the property. Thus, in *Lucking v. Ballantyne*, 132 Mich. 584, the court said:
>
> 'In the case of a tax on land, it may be stated as a general proposition that the land, and not the owner, is taxed. Purchasers and all persons interested in land understand this, and must pay the taxes as a condition of enjoying their property. It is otherwise with personal property. It has always been the policy of the law—supposedly in the interest of

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(Continued from preceding page)

annexed, is designated as the 'tax roll.' *The liability of the party assessed to pay the tax becomes fixed when the tax is extended upon the original assessment roll.*

The taxes in this case assessed against the plaintiff became a debt to the township when the roll was completed, and remained a debt which it was the duty of plaintiff to pay. * * *" (Italics ours.)

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*Appended in full, Appendix p. 24a.

> trade—to make personal property easily transferable, and to secure to purchasers and mortgagees the entire title of the seller and mortgagor.' "

Restated in *Opinions of Attorney General of Michigan*, 1940, p. 524.

See also *Dunitz v. Pick Co.*, 241 Mich. 55, 216 N. W. 382, wherein the Supreme Court of Michigan said:

> "The Lucking case has been the law of this state since 1903. It states a rule of property by which purchasers may be guided."

In the case of personal property taxes, this levy or charge can only be made to the person named in the assessment roll as there is no provision in Section 7 for such levy or charge to be made against the personal property.

The fact that a lien is provided for in other sections of the *Charter* does not alter the fact that the assessment in the sense of it being a charge or levy is only against the person in the case of a personal property assessment. (See later discussion of effect of lien.)

The property (personal) is never used in the assessment procedure except as a basis according to its valuation for the taxes levied and collected and such levy is in *personam* as contrasted to the real property levy which is *in rem.*

Furthermore the *Charter* (Sec. 2 Chap. II, Title VI, Appendix p. 14a) provides that in the case of a real property assessment a mistake in naming the owner will not vitiate the assessment or tax. In the case of a personal property assessment such a mistake can be fatal to collection of the tax.

Detroit Trust Co. v. Detroit, 269 Mich. 81, 256 N. W. 811.

C. Liability or Responsibility for Payment of Tax

Under the *Charter* (Sec. 26, Ch. IV, Title VI, Append
p. 17a) and *State Laws* these taxes, if unpaid, can be co
lected by suit in assumpsit for the collection of the de
against the "person or corporation refusing or neglecti
to pay such taxes",—which here could only be Murra
the "taxpayer" named on the roll.

The Supreme Court of Michigan has in several cases su
tained the right of the City under its Charter to assess pe
sonal property taxes against the person in possessio
rather than the owner, when it so elects. In that event
has authority to collect the personal property taxes, if u
paid, by suit in assumpsit against such person in posse
sion, and only against such person.

> *Detroit Shipbuilding Company v. City of Detro*
> 228 Mich. 145, 199 N. W. 645, 135 A. L. R. 59
> *City of Detroit v. Gray*, 314 Mich. 516, 22 N.
> 2d 771;*

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* At page 520 of 314 Mich.:

"Plaintiffs urge that household furniture is properly assessed
personal property taxes to the husband although title to the sa
has been transferred to his wife.

Title 6, chap. 4, §1, of the Charter of the City of Detroit, provi
in part, as follows:

'The owners or persons in possession of any personal prope
shall pay all taxes assessed thereon.

In the case of *Detroit Shipbuilding Co. v. City of Detroit*,
Mich. 145, we held that personal property owned by a foreign c
poration, but in the possession of a Detroit firm, was taxable to
Detroit firm."

> See also *Carstairs v. Cochran*, 193 U. S. 11; *Detroit Trust Co. v. Detroit*, 269 Mich. 81, 256 N. W. 811.

Another example of the personal nature of a personal property tax is that an executor or administrator of an estate becomes personally liable for such a tax assessed against him while the property is in his hands before distribution. A suit may be brought against him personally for collection of the tax as a debt but not against the property of deceased in his hands. And he remains liable under Michigan law after distribution unless he notifies the treasurer of such distribution.

> *City of Detroit v. Stafford*, 320 Mich. 6[*] 30 N. W. 2nd 410.

See Opinions Atty. Gen. of Mich. 1928-30, p. 176, Appendix p. 24a.

Provision for Lien Does Not Change Character of Assessment and Is Not Before the Court

The character of the tax is not changed from one *in personam* to one *in rem* by the fact that the *Charter* and the *State Law* provide for a lien (*Charter, Title VI, Chapter IV, Section 26* and *Section 1*, Appendix 14a).

In *Land O'Lakes Dairy Co. v. Wadena County*, 229 Minn. 263, 39 N. W. 2d 164, the Supreme Court of Minnesota said of a similar tax (p. 173):

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[*] In *City of Detroit v. Stafford*, *supra*, it is stated (pp. 6, 7, syllabus):

> "An executor or administrator is personally liable for taxes on personal property accruing against an estate afer death of decedent and prior to giving notice to tax-collecting authorities of distribution, hence enforcement of payment is against him personally and not against the property of the deceased in his hands (1 Comp. Laws 1929, §3429, as amended by Act No. 38, Pub. Acts 1934 (1st Ex. Sess.); §§3401, 3402; Detroit Charter, title 6, chap. 4, §§1, 26)."

> "Personal property taxes, being only *in personam* and not against the property, have no effect upon the property, except where the state attempts to enforce its lien therefor against the property. The taxpayer's tax liability and the State's lien rights against the particular property involve separate questions. At this stage of the proceedings only the liability of the taxpayer for the tax is involved. Since the tax may be collected out of the taxpayer's other property, it may never become necessary to resort to the property on the ownership of which the tax is based. The question is whether one using property, upon which the government holds a mortgage is immune upon federal grounds from a personal property tax imposed upon him *in personam*. We think that this question is answered emphatically in the negative by the *Oklahoma Tax Comm. case (Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, 92 L. Ed. 721) supra, and the numerous decisions of the Supreme Court of the United States there cited."

This Court affirmed the decision in Land O'Lakes upholding the taxes involved, as follows (338 U. S. 897-9):

> "Dec. 12, 1949. *Per Curiam*. The motion to affirm is granted and the judgment is affirmed. *S. R. A. Inc. v. Minnesota*, 327 U. S. 558, 90 L. Ed. 851, 66 S. Ct. 749; *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, 93 L. Ed. 721, 69 S. Ct. 561."

See also:

> *Northern National Bank v. Northern Bank*, 244 Minn. 202, 70 N. W. 2d 118, reaffirming *Land O'Lakes, supra*, at pp. 125-6, 70 N. W.

See also *Reynolds Aluminum Co. v. Multnomah County* 206 Or. 602 287 P. 2d 921, wherein the Supreme Court of Oregon said (p. 929):

> "Section 110-312, O. C.‚L. A., as amended, supra, prescribed *to whom* personal property may be assessed, as follows:
>
> '* * * Personal property may be assessed in the name of the owner *or any person having possession or control* thereof.' (Italics ours.)
>
> "In the light of these statutes, it is manifest that the assessment in this case was properly made by defendants. *We are in no way concerned with the enforcement of the tax lien; that is not an issue in this case. Yet it might be well to point out that ample provision is made by statute for the collection of the tax without in any manner affecting any right or lien of the United States.*" (Italics ours.)

That provisions in tax statutes for a lien on property, even though it be government property, do not affect the validity of the tax is declared by this Court in *West v. Oklahoma Tax Comm.*, 334 U. S. 717 at pp. 725-6. See also *S. R. A. v. Minn.*; *New Brunswick v. U. S.* and *U. S. v. Alabama*, discussed *infra.*

The Incident or Direct Burden of This Tax Is on the Person, Here Appellee

To summarize, as noted in Minnesota, so it is in Michigan, and in this case—the personal property tax is *in personam* and is regarded as a form of personal taxation. No lien is being enforced nor need or could it be *(United States v. Alabama*, 313 U. S. 273, *supra).* The tax, if unpaid, could be collected by suit against the taxpayer (Appellee) or out of appellee's other property. In this proceeding, only the liability of the taxpayer for the tax is involved and furthermore the taxes having been paid, any lien has been extinguished.

We submit that this form of taxation as provided by the *Michigan Statutes* and the *City Charter* for the assessment and collection of personal property taxes is regarde as a form of personal taxation and that the substance o the procedures under the law is to lay a personal tax upo the person named in the assessment roll, whether it be th owner or the person in possession, upon and according t the value of the personal property owned or in the possession of such taxpayer on tax day. *(City Charter, Se tion 7, Chapter II, Title VI, supra.)*

The direct burden or incidence of these taxes is, therefore, upon and against the independent contractor, appellee. There is no possible interference with the operations of the Federal Government either by the assessmen or any possible collection of the tax in case it were unpai all within the principles laid down in *M'Culloch, supr* and *Dravo, supra,* and the other cited decisions of thi Court which follow the direct burden and incidence rule.

The personal character of the assessment and obligation to pay the taxes and the collection thereof as bein against the person in possession, when he is the taxpaye named, is supported both by the assessment itself, the la and decisions of Michigan's highest Court fixing the in dence of the tax against the taxpayer named. Such d terminations being final, (See *Federal Land Bank v. Bi marck,* 314 U. S. 95; *S. R. A. v. Minn.; Alabama v. Kin Boozer, supra*) it must follow that whatever the Unite States' title may be to the materials in question, the d rect burden or incidence of the assessment, the obligati to pay the tax and the collection thereof, is to or again appellee and only appellee, a private contractor.

Federal Government's Interests Protected

To protect the claimed title of the United States to certain of the personal property in appellee's possession, the assessors placed on the roll the words "assessed subject to prior rights of Federal Government". (See *Pet. of Edw. Hines Lumber Co.*, 196 Or. 420, 248 P. 2d 720, 723) wherein the Supreme Court of Oregon said:

> "* * * the tax in question is directed solely against the interest of the company in the whole value of the logs, the rights of the government being unaffected. The assessment roll itself clearly states that the logs are assessed 'subject to the prior rights of the Federal Government,' just as were the lands assessed in the S. R. A. case 'subject to the prior rights of the Federal Government.'
>
> Government immunity from state taxation is premised on the proposition that an added burden would be imposed upon the government if state taxation were permitted. By § 110-839, O. C. L. A., taxes levied on personal property becomes a debt due and owing from the owner of such personal property, and by ch. 389, Oregon Laws 1941, such personal property taxes may become a lien on the real property so that the tax on the logs in question could be collected from the company without in any wise interfering with the government's rights in the premises."

To the same effect and using the *Hines case* as authority, see *Reynolds Aluminum Co. v. Multnomah County, supra*, p. 104.

So that whatever interest the United States might have in this property was protected by this language in addition to the protection afforded by law without such language (*United States v. Alabama*, 313 U. S. 274; *S. R. A.*

v. Minnesota, 327 U. S. 558; *New Brunswick v. United States*, 276 U. S. 549.)*

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*In the *S. R. A. case* the State had protected the Government's "paramount rights" in property by making the levy and judgment for taxes "subject to fee title remaining in the United States of America" (See *Petition of S. R. A., Inc.*, 7 N. W. 2d 484, 486). This Court said (pp. 857-8, 90 L. Ed. 327 U. S. 557, 565-566):

> "The nub of this case, that is the immunity from state taxation of property to which the United States holds legal title, remains. *Minnesota took care to leave unassessed whatever interest the United States holds. The levy and judgment was 'subject to fee title remaining in the United States of America.'* 219 Minn. at 496, 18 N. W. 2d 446. *Although Minnesota real estate taxes are assessed on the parcel of land as a 'unitary item' including 'all rights and privileges,' the state does not claim that a tax sale will divest the fee title of the United States.* 213 Minn. at 499, 7 N. W. 2d 487, 490. *Apparently the state is of the view that the equitable interest alone may be sold under its laws, leaving the fee of the United States in its position of priority over any interests which may be transferred by the tax sale.* 219 Minn. at 513, 18 N. W. 2d 453. *Such a construction of the state law is binding upon his Court. It does not impinge upon federal rights. So long as that situation exists, the determination of the state cannot be challenged here.* The possibility of repossession by the United States is not enough to block a tax sale in which the paramount rights of the United States are protected. *Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 19 U. S. 375, 381, 382, 49 L. ed. 242, 244, 245, 25 S. Ct. 50; *New Brunswick v. United States*, 276 U. S. 547, 556, 72 L. ed. 693, 698, 48 Ct. 371; *United States v. Alabama*, 313 U. S. 274, 282, 85 L. ed 1327, 1332, 61 S. Ct. 1011." (Italics ours.)

And this Court said in *United States v. Alabama, supra* (pp. 1332 1333, 85 L. Ed. 313 U. S. 273, 281-282):

> "Our present inquiry is whether, assuming the validity of th state statute creating a lien as of October 1, 1936, as against othe subsequent purchasers, it should be demed invalid as against th United States. *The question is not whether such a lien could be enforced against the United States. The fact that the United State had taken title and that proceedings could not be taken against th United States without its consent would protect it against such enforcement. But that immunity would not be predicated upon th invalidity of the lien.* * * * (Italics ours.)

A proceeding against property in which the United States has a interest is a suit against the United States. *The Siren*, 7 Wal

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The real significance of these decisions is the concern of this Court that whatever interests the Government may have in the property which was the subject of taxation, has been protected from the enforcement of the lien, and the court's unconcern about the tax levy as the assessment itself being on the entire property including the Government's interest therein.

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(U. S.) 152, 1, 4, 19 L. ed. 129, 130). The United States was an indispensable party to proceedings for the sale of the lands, and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void. *Minnesota v. United States,* 305 U. S. 382, 386, 83 L. ed. 235, 240, 59 S. Ct. 292."

And in the case of *New Brunswick v. United States, supra* (276 U. S. 547, 555, 556).

"It is unquestioned that so long as the corporation (United States Housing Corporation) held title to the lots as an instrumentality of the United States and *solely for its use and benefit,* they were not subject to taxation by the city. *Clallam County v. United States,* 263 U. S. 341, 344, 68 L. ed. 328, 331, 44 Sup. Ct. Rep. 121. * * *

We see no reason, however, if the New Jersey law permits, why the city may not assess taxes against the purchasers upon the entire value of the lots and enforce collection thereof by sale of their interests in the property. With that the corporation and the United States have no concern. But it is plain, under the doctrine of the Clallam County Case, that the city is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the corporation as security for the payment of the unpaid purchase money, whether as an incident to the retention of the legal title or as a reserved lien or as a contract right to mortgages. That interest, being held by the corporation *for the benefit* of the United States, is paramount to the taxing power of the state and cannot be subjected by the city to sale for taxes.

We conclude that, although the city should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens and interests in the lots, retained and held by the corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, and they are made, by express terms, subject to all such prior rights, liens and interests. This, we think, will meet the equities of the case as between the corporation and the city, and fully protect the paramount right of the United States." (Italics ours.)

All of the requirements for protection of the Government's interest in the property here involved have been met exactly as they were in the foregoing cases.

This Court's statement in *New Brunswick, supra,* (p. 555) 276 U. S. that "so long as the corporation held title to the lots as an instrumentality of the United States and *solely for its use and benefit* they were not subject to taxation by the City (citing *Clallam County v. United States*)" is particularly relevant to the facts here. We have and will show that whatever title the United States may have in the materials here involved, such title is not being "*held solely for its use and benefit*" but instead for the use and benefit of appellee, a private contractor.

With the Government and its property actually immune from any consequences of the taxes such as personal liability or levy or sale of the property, these taxes constitute no more interference with United States operations than if they were payments-in-lieu-of taxes such as the President's Commission on Intergovernmental Relations has recommended be paid on this type of property.

For Report of this Commission See *Hearings Befor the Committee on Governmental Operations, United State Senate, 84th Congress, 1st Session, July 25, 1955, Appendix II, p. 200.*

The only immunity which the appellee and Governmen then is here concerned with is exemption from payment o taxes, such exemption being only immunity from th economic burden. This Court no longer considers suc a burden sufficient to justify application of the immunit doctrine. *James v. Dravo; Graves v. New York; Alabam v. King-Boozer, supra.*

As the Court said in *Graves* (306 U. S. p. 487):

> "The burden (economic so far as it can be sai to exist or to affect the government in any indire

or incidental way, is one which the Constitution presupposes."

Real Interests Should Be Determined Regardless of Labels

Labeling this tax as a personal property tax or the Government as title holder of the property should not foreclose this Court from ascertaining the true nature of the tax and of the Government's interests in the property.

In *Offutt Housing Co. v. Sarpy*, 351 U. S. 253, this Court said at p. 261:

> "Petitioner also argues that the state tax, measured by the full value of the buildings and improvements, is not on the 'lessee's interest' but is on the full value of property owned by the Government. Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interests created and so does not solve the problem. See *Millinery Center Bldg. Corp. v. Commissioner*, 350 U. S. 456, 100 L. Ed. 545, 76 S. Ct. 493."

In fact, the title taken by the Government in that case was much more realistic than the title it purports to take here. (See discussion under question II this brief.) See description of Government's interests in *Offutt, supra*, by Justice Douglas, dissenting, with Justices Reed, Burton and Harlan.*

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*Pp. 264-265 U. S.:

"The Government's stake here cannot be measured by bare legal title. It has vast and important interest in these projects. It owns the controlling stock in the lessee. It prescribes the maximum rentals. It determines what persons may occupy the living quarters. It assumes most of the financial risks of these housing

(Continued on next page)

The language of the majority opinion in *Offutt* is at variance with the statement in *Kern-Limerick, supra,* (347 U. S. 110, 122-123):

> "* * * since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for the decisions consistently prohibit taxes levied on the property or purchases of the Government itself."

and, in effect, is in harmony with the language of the dissenting opinion of Justice Black, Chief Justice Warren and Justice Douglas in that case, supra, when they said (pp. 126, 127):

> "What was important in King & Boozer was the substance of the transaction and the nature of the economic burden on the United States. On these two paramount issues it is impossible to distinguish the present case.
>
> The concepts 'title,' 'agency,' and 'obligation to pay' are no basis for this constitutional adjudication. Today they are used to permit any government functionary to draw the constitutional line by changing a few words in a contract. When the Congress deliberates over this problem, as it often has, it does not worry about the passing of title or other legal technicalities. The Congress debates whether

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(Continued from preceding page)

projects by insuring the mortgagees. It provides police and fir
protection, sewerage and water service, and access roads. Th
United States is not a mere lessor who, having leased the prop
erty, allows it to be managed by the lessee. The great decision
as to management are made by the Government. The lessee i
indeed, a managing agent. * * *."

as a matter of policy, including the need of the States for revenue, the holder of a cost-plus government contract should be immune from state taxation.

Alabama v. King & Boozer and the cases it followed were a long step forward from the time when a State's power to tax was nullified whenever the federal treasury was even remotely affected. We should not take this equally long step backwards. We should hold that, until the Congress says differently, the States are free to tax all sales to cost-plus government contractors. We should dispense with fruitless talk of agency, titles, and obligations to pay. The *legal incidence* of a tax is a matter for the States to determine. We should decide today, as we did more than a decade ago, that a tax on a contractor for goods he uses is constitutional, even though the *economic burden* falls on the Federal Government."

D. Substance and Effect of This Tax Do Not Constitute Interference With Operations of Government

Can the materials here involved be construed as "means employed by the Government of the Union for the execution of its powers" as this Court has defined and now understands the phrase?

The airplane and engines, sub-assemblies and parts, contracted for with Kaiser and Wright, when completed, inspected, accepted and delivered to the Government, then may be "means employed by the Government of the Union for the execution of its powers" for national defense. But, if the Government has not contracted for the purchase of the materials that will constitute those planes, are those materials in any sense the "means" merely as materials?

There is no evidence here that the Government so considered them.

The claims of appellee and the Government rest entirely on the contention that title to such materials was acquired by the Government by virtue of a contract provision and that is sufficient, *ipso facto*, to immunize them from taxation. There is no claim, nor could there be, that the contracts with appellee contemplated the purchase by the Government of any of the materials in controversy, nor did they contemplate the purchase of the planes, etc. in portions. They (the materials) were acquired or produced by appellee for the sole use of appellee in performance of its contracts with Kaiser and Wright (R. 98). The enjoyment of the entire worth of these consumable materials and work in process, as such, is, therefore, appellee's until delivery of its finished products. See *Offutt Housing Co. v. Sarpy supra*, p. 261 of 351 U. S.

The Government set out to buy airplanes and airplane engines, assemblies and parts and contracted with Kaiser and with Wright to produce them, permitting those firms subsequently to sub-contract for production of certain items for the assembly of those planes and engines, assemblies and parts.

The Government was not buying nuts and bolts or rubber or steel or other materials and supplies or inventories from the prime contractors and was buying nothing at all from appellee either then or afterwards.

Such were the prime contracts as originally entered into by letters of intent, etc. (R. 142, 189).

Later, both Kaiser and Wright received permission from the Government to sublet parts of the work to appellee such original sub-contracts being between Kaiser and Wright and appellee respectively, the Government not being a party thereto and by endorsement thereon (R. 172, 221) being entirely free of any obligation thereunder.

Kaiser and Wright (not appellee) were still obligated to the Government to produce finished planes and engines, etc., but appellee's sub-contracts did provide for the Government's right of inspection, etc. of the latter's production and other Government protections as were provided in the prime contracts. Still, there is no evident intent by the Government to purchase any materials such as here involved, separate from the planes, engines, assemblies or parts, etc., that they had ordered from Kaiser and Wright.

And still, at this point, no immunity may be claimed from taxation (no title of any kind being yet acquired by the Government, no partial payment having yet been made to effectuate it) of anything but the completed and delivered products ordered.

Did the Government suddenly decide that these materials (separate from the planes and engines) had become so essential to national defense that they required protection from adverse action or influence by the State or individuals?

No amendment was ever made to these contracts so that they would become contracts of purchase of materials, rather than planes and engines, assemblies and parts, nor were they amended so that the Government would take title to such materials as such, separate from the completed planes or engines, absent partial payments being requested, nor did they, at any time, constitute Kaiser or Wright as purchasing egents of the Government in their acquisition, as in *Kern-Limerick and United States v. Scurlock, supra.** The same facts concerning appellee's sub-contracts are even more compelling to these conclusions, there also being no privity of contract between appellee and the United States.

Government Acquisition of Title Dependent on Contractor's Request for Partial Payment

If, up to this point, these materials were not *means employed by the Government of the Union for the executio of its powers*, and if up to now any taxes levied against appellee as "the person in possession" thereof would not "retard, impede, burden or in any manner control the operations of the general Government," under the doctrine o Chief Jusitce Marshall, could they now or later suddenly change their character so that they became such *means*, so that any taxation would "retard, impede, burden or in any manner control the operations of * * * the general Government," and, if so, what compelling reason was there fo such change and by what magic wand were they so transformed?

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*The majority opinion of this Court in *Kern Limerick, supr* held that, because the contract there involved made the contractor th agent of the Government in the purchase of materials that they wer purchased for the Government's account and paid for by the Government on voucher and the contractor was the purchasing agent of th Government, the incidence of a sales tax (which, under Arkansas la made the purchaser responsible for the tax) was therefore on th Government and the tax invalid. (The fact that the Government too title on delivery to the contractor was held of no significance in *Al bama v. King & Boozer* or in *Kern-Limerick*.

The opposite of that situation is true here—where the contracto purchases for himself, on his own credit and pays for the materia himself, the Government assuming no responsibility whatever in th transaction, nor is the contractor the Government's purchasing age at any time. The facts here are analogous to the facts in *Alabama* *King and Boozer, supra*, appellee's only relation contractually with th Government being through its contracts with the prime contracto and that only for the manufacture of parts or assemblies. In fac any obligation of the Government to appellee is specifically denied endorsement on these sub-contracts (R. 221 and 172).

The simple fact (having nothing to do with Government protection, either from local taxes, regulations, loss of property or otherwise) is that appellee initiated the request for inclusion of these partial payment clauses in its subcontracts, and in the Kaiser prime contract by Amendment (R. 161) and made requests for payments thereafter, presumably for financing purposes.

Appellee was therefore in the position of being able to invoke Governmental immunity for its materials by a mere request for and receipt of a partial payment from the prime contractor. This Court, in *Graves v. New York*, 306 U. S. 466 said at p. 483:

> "Where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed."

Under the partial payment title-transfer terms of these contracts the Government could never, on its own initiative, take title to materials or work in process or anything but the finished products nor was the Government purchasing these materials as this Court held it did in *Kern-Limerick* and *United States v. Scurlock*, 347 U. S. 110, and *United States v. Allegheny County*, 322 U. S. 174.

If the Government then could not take title unless or until appellee requested money and if it didn't ask for any the Goveriment never could acquire title, what other conclusion can be drawn than that the only purpose of such title transfer was for security of the payments made?

If by mere acquisition of title under this clause, these materials became "means of operation of the government," then they could never achieve that status until and unless the contractor invoked his right to request partial payment.

If security of the materials was needed, other than financial reasons, why was the Government helpless to that security in the form of "title" unless and until pellee asked for such partial payment?

As further evidence that security for partial paym was the sole purpose of the title transfer provision is fact that under the liquidation of partial payments cla in the sub-contract (R. 176) (discussed under Question upon completion and delivery of assemblies or parts ec in value to the partial payments made, title to all materi work in process, etc. still in the contractors' hands or a acquired by it vests (re-vests) in the contractor. Do th materials and work in process then change character ag from means of government operation to mere nuts and b and steel, etc., not needing protection from hostile le action or taxation?

The answer is self-evident.

Government Not Interested in Obtaining Title to Materials Absent Partial Payment

Furthermore, if transfer of title of these materials necessary for the protection of the Government from adverse actions against it by anyone, no one in the G ernment was apparently too concerned. It took seve months to process the request of appellee made to Wri for instance, to the point of actually making a partial p ment on the Wright contract and then it was made on cember 31, 1951, nine months after appellee had ente into its sub-contracts. (Co-incidentally, tax day in troit is January 1st!)

And what about the materials in the hands of th Government contractors who get no partial payments a consequently the United States gets no title?

Many of them are and were producing parts for planes the same as appellee was—(some in Detroit).

Are these contractors' materials any the less "means" entitled to freedom from State control of taxation than appellee's?

Why should some materials (and appellee itself had materials under other defense contracts having no partial payment-title transfer clauses) (R. 96) be protected from local taxation and others not?

If this protection can be so provided or not provided by the mere use of or failure to use words in a contract or by the exercise or failure to exercise contract prerogatives by a contractor, the essence of governmental immunity which is the sovereign freedom from control or interference has become something which can be turned on and off by individuals like a water faucet.

Inconsistent Effect on Contractors and Taxing Units of Title Transfer

The logical result of this contract-created-immunity produced by these partial payment-title transfer clauses (if it can be so created legally) is to provide situations where manufacturers even in the same tax jurisdiction are subject to taxation or not subject to taxation depending on their respective whims or financial needs in the exercise of their rights under this type of Government contract clause—not to mention other manufacturers having no Government contracts, who have no such method available to them to escape their tax responsibilities.

So far as the local community is concerned, manufacturer A then may, if he has a Government contract with a partial payment title transfer clause in it, by merely asking for and receiving such a payment, immediately immunize his entire inventory from local taxation and escapes p thereby of his fair share of the costs of local gove services. On the other hand, manufacturer B, who a a Government contract, failing to take advantage a contract clause or without such a clause in his c must pay his full taxes and share the cost of local ment even as manufacturer C who has no gove contract at all.

The illustration afforded by the comparison of th manufacturers, A, B and C above, demonstrates how decision dictated by necessity such as Chief Marshall's, can be extended and distorted by thos ing to take advantage of it, to the ultimate abs purely for selfish purposes. Obviously this has no whatever to the fundamental philosophy of Gove immunity, i. e. the Federal Government's protectio hostile state action or attemps to control or destr government or its institutions. The Chief Justice that attempts would be made to extend his opinion its proper limits and here is a perfect example of attempted extension. *(M'Culloch v. Maryland, 4 609) supra.*

E. Allegheny Compared and Distinguished

How does this assessment and tax compare with t involved in *United States v. Allegheny County, 32* 174, wherein this Court invalidated a tax the m opinion said was "on" personal property of the States?

The taxes in *Allegheny* were assessed under rea erty assessment laws which, in Pennsylvania, as Michigan and in most States, make the property de the subject and object of the assessment and levy.

dition, the tax levy included, or so this Court held, machinery in or on the real estate assessed whether owned by the owner of real estate or not, and, as the majority opinion described it, "* * * the substances of this (the real estate tax) procedure is to lay an *ad valorem* general property tax on property owned by the U. S. (the machines)." (p. 185, U. S.).

The Court further said that:

> "This form of taxation is not regarded as a form of personal taxation, but rather as a tax against the property as a thing." (p. 184 of U. S.)

As we have shown, our personal property taxation is regarded as a form of personal taxation rather than as a tax against the property as a thing and so is not within the proscription of *Allegheny*.

The tax here is against the person, rather than the property, and is purposely designed to fix responsibility upon the taxpayer so that the taxes can be collected from him, because of the transient nature of personal property.

Once the Court in *Allegheny* came to the conclusion (which conclusion was contrary to the facts and the repeated decisions of the Pennsylvania Supreme Court, as the dissenting opinions pointed out), that the substance of the assessment procedure under Pennsylvania law was to lay an *ad valorem* general property tax on United States property, the issue was decided. Much that follows in the opinion was explanatory or dicta. Subsequent decisions of this Court have stricken the foundations from the majority opinion.

Distinctions From and Conflicts With Allegheny in Subsequent Decisions

Cases like *Esso, supra,* attempt to distinguish the fa
in those cases from those in *Allegheny,* but the distincti
are technical, having little or nothing to do with underly
principle of constitutional immunity as laid down by Cl
Justice Marshall in *M'Culloch v. Maryland,* and as defi
by *Thomson v. Union Pac. R. R.,* and *Union Pac. R. R*
Peniston, supra, and re-affirmed by Chief Justice Hug
in *Dravo, supra.*

To say, as the Court did in *Esso* that it makes a diff
ence whether a tax is measured by the "quantity" of G
ernment property in a contractor's hands rather than
"worth" thereof (so far as its effect on the operations
the Government or whether it is a tax on the "means
government operations" affecting its validity or invalid
under the immunity doctrine), is merely an attempt to
tinguish the indistinguishable, an attempt to skirt arou
some of the explanatory phrases or dicta in *Allegheny*

The storage of the Government's gasoline by Esso
hire was a bailment with Esso as the "bailee", as w
Mesta in *Allegheny,* or, more properly, the lessee.
principle the distinctions drawn between *Esso* and *A*
gheny cannot be rationalized under the immunity doctri

New Brunswick and *S. R. A., supra,* are out of harmo
with the explanatory language of *Allegheny* when t
Court holds that property to which the Government ho
title (albeit the vendor's interest, which moneywise may
greater than the vendee's interest) may be assessed for
ad valorem real property tax at its full value (not "m
sured by the quantity" of the property). There was
attempt in those cases by the taxing authorities to app
tion the value between buyer and seller as to their interes

The taxes in *S. R. A.* and *New Brunswick supra*, were *ad valorem* assessments against the property (as all real estate assessments, with few exceptions, are) and not against the vendee's equitable interest. The tax could be collected however by selling the vendee's interest only. The only separation of interests was on foreclosure, not in the assessment. The tax here involved can be collected by suit in assumpsit against the taxpayer personally or by selling any of its personal property, and there can be no foreclosure of any Government property.

No comparison can be made between property purchased or already owned by the Government as these machines were in *Allegheny*, and property not bought or intended to be bought by the Government but to which only title is taken, as here, *for financial protection.*

The Supreme Court of Pennsylvania in *Allegheny, supra*, found that the incidence of the tax was on Mesta, a private manufacturer, based on historic precedents of that court in interpreting the State tax laws involved. The value of machinery in a mill or factory under those decisions, whether owned by the owner of the mill or factory or not, could be included as a part of the valuation of the mill or factory for tax purposes but the lien for such taxes only attached to the real estate and not such machinery.

This was a determination by the State's highest Court of the incidence of the assessment and, no Federal contract rights or interests being involved in that determination, should have been final and conclusive on this Court, as Justice Frankfurter so stated in his dissent and in accord with such decisions of this Court as *Federal Land Bank v. Bismarck, S. R. A. v. Minnesota, Alabama v. King & Boozer, supra*.

The fact that the tax in *Allegheny* was an *ad valorem* property tax and not a privilege tax should have made no difference if the incidence was not on the Government and the Government was protected as in *Offutt, S. R. A., New Bruswick supra.*

As we have heretofore shown, *Allegheny*, is distinguished from the facts and law here involved and further is out of harmony with correct principles of *Dravo, King & Boozer, Graves v. New York, S. R. A.* and *New Brunswick, Esso, Halvering v. Mountain Producers, Oklahoma Tax Com. v. Texas Co., supra,* and with the basic philosophy of *M'Culloch, Thomson* and *Peniston, supra.*

Both Justice Roberts and Justice Frankfurter (dissenting) were agreed that the majority decision in *Allegheny* could not be reconciled with *Dravo* or *King & Boozer* and that if those two decisions were followed, the facts in *Allegheny* were within their principles as imposing no unconstitutional burden on the Government, the direct burden of the tax levy being against an independent contractor and its property, Government property being used merely to enhance the value of the contractor's property.

As Justice Roberts said (p. 193, 322 U. S.):

> "In this case, as I think, the court necessarily reverts to the test of burdensomeness by a form of words and, as a result, again plunges the applicable principle into confusion."

And as Justice Frankfurter said (p. 195, 322 U. S.):

> "This controversy is treated by the Court as though it presented a challenge by Pennsylvania to the authority of the United States. The case is not entitled, on the facts as I understand them, to have such importance attributed to it."

The lower Court's decision in this case by its reliance almost solely on *Allegheny* also reverts to the test of burdensomeness by a form of words in the State law and the contract and has treated this controversy as though it presented a challenge by the City of Detroit and the County of Wayne to the authority of the United States.

The facts here do not justify such conclusions.

Exemption May Not Be Created Indirectly If It Cannot Be Created Directly, Where Not Constitutionallly Implied

Under cases previously cited, property of a contractor used by a contractor in the performance of a Federal Government contract is subject to state taxation, and the contracting parties *cannot change the rule by stating in the* contract that such property "is exempt from state taxation." Such a provision would require specific congressional authorization. The Constitutional implication of immunity not being applicable to the contractors' materials, mere changing of title without anything else does not change their character under such doctrine.

In the instant case, the Government contracting officers have attempted to do by indirection what they could not accomplish directly. So far as the effect of the questioned "title" clause is concerned, the contracting parties might as well have made an outright statement in the contract that the "property is exempt" since it is reasonably obvious that nothing else was intended to be accomplished except possibly financial protection in the nature of a lien. See *U. S. v. Lennox*, 225 F. 2d 302, discussed in question II, *supra.*

As a matter of fact, this transfer of title to the Government, with appellee retaining possession would be void as to

creditors under local recording acts. It certainly is not i
accord with ordinary business practices.

If this practice is approved, the Government will be ab
to have its cake and let someone else eat it. A convenie
arrangement if you want to avoid the responsibilities
ownership but still have the benefits thereof.

Summation

We suggest that the words of this Court in *Oklahom*
Tax Commission v. U. S., 319 U. S. 598, 610, should
given serious thought in the consideration and decision
this case:

> "Recognizing that equality of privilege a
> equality of obligation, should be inseparable a
> sociates, we have recently swept away many of t
> means of tax favoritism. *Graves v. New York*, 3
> U. S. 466, 83 L. Ed. 927, 59 S. Ct. 595, 120 A. L.
> 1466, permitted States to impose income taxes up
> government employees and *Helvering v. Gerhar*
> 304 U. S. 405, 82 L. Ed. 1427, 58 S. Ct. 969, permitt
> the federal government to impose taxes on state e
> ployees. *O'Malley v. Woodrough*, 307 U. S. 277,
> L. Ed. 1289, 59 S. Ct. 838, 122 A. L. R. 1379, ov
> ruled a previous decision which held that judg
> should not pay taxes just as other citizens, and *H*
> *vering v. Mountain Producers Corp.*, 303 U. S. 3
> 82 L. Ed. 907, 58 S. Ct. 623, *supra*. repudiat
> former decisions seriously limiting state and fe
> eral power to tax. See also *Metcalf v. Mitch*
> 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172, a
> *James v. Dravo Contracting Co.*, 302 U. S. 134,
> L. Ed. 155, 58 S. Ct. 208, 114 A. L. R. 318. T
> trend of these cases should not now be reversed.

If appellee is relieved from payment of these taxes, th
there will be *equality of privilege* for this corporation a

others similarly situated in Michigan and elsewhere but *inequality of obligation.*

In conformity with this recently established trend of stringently restricting the scope of the doctrine of the implied immunity of the Federal Government from taxation, this Court now looks to the formal identity of the tax payer. Where the legal incidence of a tax falls upon a contractor and not on the Government, no immunity is established even though the indirect effect of the tax is to increase the cost of the Government. The identity of the taxpayer upon whom the tax is imposed is of controlling importance under the "legal incidence" or "direct burden" test as the cases previously discussed illustrate.

It may be that "the power to tax involves the power to *destroy*" *if unlimited*, but the converse is equally true. We submit that the power to claim tax immunity involves the power to destroy local government of the power of the United States procurement officials to create such immunity for private industry by contract is unlimited. There is no express exemption in the Federal Constitution, or statutes. The same salutary judicial principles which prevent taxation from becoming oppressive to the Federal Government, likewise should prevent tax exemption from becoming oppressive to local government. When it is asserted by the Government that the "right" to tax exemption can be extended to private industry by provisions in contracts with private persons, the salutary principles upon which tax immunity was originally predicated cease to have any application. There is no threat here to destroy the Federal Government or any of its instrumentalities. There is however a threat here to seriously cripple local government.

In general we contend for the proposition that tax immunity is not absolute but is co-extensive with the threat to

sovereignty and ceases when the threat ceases; that ther
is no threat in this field of taxation and indeed no burde
at all except that created by the contracts of the parties
and that in ascertaining the existence of a threat t
sovereignty we are not concerned with nominal title o
ownership or types of taxes nor with the form or frame
work of transactions, ingeniously devised by over-zealou
public servants, but are concerned only with substance an
realities.

Where the tax is non-discriminatory and there is no i
terference with the functioning of the Federal Governmen
and the incidence of the tax falls upon private interests o
persons, this Court has rightly refused to invalidate th
imposition of such a tax.

As this Court said in *Oklahoma Tax Commission*
Texas Co., 336 U. S. 342, pp. 364-365:

> "The Mountain Producers Case (*Helvering*
> *Mountain Producers*, 303 U. S. 376, 82 L. Ed. 90
> was not decided on narrow, merely technical
> presumptive grounds. Its very foundation was
> repudiation of those insubstantial bases for secu
> ing broad private tax exemptions, unjustified
> actual interfering or destructive effects upon th
> performance of obligations to or work for the go
> ernment, state or national. The decision came
> the result of experience and of observation of th
> constant widening of the exempting process fro
> tax to tax to tax.
>
> Since that decision, as we have noted, the proce
> has been reversed in direction. True intergover
> mental immunity remains for the most part. B
> so far as concerns private persons claiming i
> munity for their ordinary business operations (ev
> though in connection with governmental activitie
> no implied constitutional immunity can rest on t
> merely hypothetical interferences with gover

> mental functions here asserted to sustain exemption."

The practical effect of the lower Court's judgement in this case, if left to stand, is that an important segment of private business may be immunized from the payment of State and local taxes throughout the Country with no compensationary benefit to the United States except economic. We submit that the use of such contract-created-titles should not be permitted to transform what is essentially a tax imposed on a contractor as a private person into a tax imposed on the Government and thereby create immunity where none existed before.

CONCLUSION

For the foregoing reasons it is respectfully submitte
that the judgments affirmed below should be reversed an
the complaints dismissed.

Respectfully submitted,

CITY OF DETROIT, a Michiga
municipal corporation, Petitioner an
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and

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APPENDIX

STATUTES, REGULATIONS, CHARTER PROVISIONS, ETC.

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et. seq.

§151. PURCHASES and contracts for supplies and services—(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics, (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

* * * * *

(10) for supplies or services for which it is impracticable to secure competition;

* * * * *

§153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151 (c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secur such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contracto for the purpose of securing business, for the breach or violation of which warranty the Government shall have th right to annul such contract without liability or in its discretion to deduct from the contract price or consideratio the full amount of such commission, percentage, brokerag or contingent fee.

(c) All contracts negotiated without advertising pu suant to an authority contained in this chapter shall i clude a clause to the effect that the Comptroller General o the United States or any of his duly authorized representa tives shall until the expiration of three years after fin payment have access to and the right to examine any d rectly pertinent books, documents, papers, and records o the contractor or any of his subcontractors engaged in t performance of and involving transactions related to su contracts or subcontracts. Feb. 19, 1948, c. 65, §4, 62 Sta 23; Oct. 31, 1951, c. 652, 65 Stat. 700.

§154.

(a) The agency head may make advance paymen under negotiated contracts heretofore or hereafter e cuted in any amount not exceeding the contract price upon such terms as the parties shall agree: PROVIDED, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(h) The terms governing advance payments may include as security provisions for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree. Feb. 19, 1948, c. 65, §5, 62 Stat. 24.

R. S. §3648; 31 U. S. C. A. 529 (as amended Aug. 2, 1946, c. 744, 60 Stat. 809)

§529. ADVANCES OF PUBLIC MONEYS, PROHIBITION AGAINST

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

C. 288, Title III, §305, 63 Stat. 396, June 30, 1949,
41 U. S. C. A. 255

§255. ADVANCE PAYMENTS ON NEGOTIATED CONTRACTS; GOVERNING TERMS

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provisions for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropiate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

C. 593, 55 Stat. 838, Sec. 201, 50 U. S. C. A. 1946 ed., Sec. 611

"The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: Provided, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: Provided further, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: Provided further, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest: Provided further, That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Dec. 18, 1941, c. 593, Title II, §201, 55 Stat. 839; Jan. 12, 1951, c. 1230, §1, 64 Stat. 1257."

C. 440, 54 Stat. 676, 50 U. S. C. A. Sec. 1151

"Whenever in the opinion of the President of the United States such course would be in the best interests of national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy, or the Secretary of the Treasury in the case of Coast Guard contracts, is authorized to advance, from appropriations available therefor, payments to contractors in amounts not exceeding 30 per centum of the contract price, upon such terms as such Secretary shall prescribe, and adequate security for the protection of the Government for the payments so made shall be required. The Secretary concerned is further authorized in his discretion to make partial payments on the balance of the contract price from time to time during the progress of the work, such partial payments not to exceed the value of the work already done, but to be subject to a lien as provided by the Act of August 22, 1911 (37 Stat. 32; 34 U. S. C., § 582), entitled "An Act authorizing the Secretary of the Navy to make partial payments for work already done under public contracts": Provided, That the Secretary concerned shall report every three months to the Congress the advance payments made under the authority of this section. June 28, 1940, c. 440, Title I, § 1, 54 Stat. 676."

12 F. R. 7693, 7704 (Apr. 5—407.2(1))

"Partial Payments—Partial payments, which are hereby defined as payments prior to delivery on work in progress for the Government under this contract, may be made upon the following terms and conditions.

"(a) The Contracting Officer may, from time to time authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract; Provided, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the Property upon which payment is made which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract exceed 80 percent of the total amount authorized to be expended under paragraph 5 of this Letter Contract.

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production; Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder, or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts, and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Clause shall vest in the Contractor.

"(e) The provisions of this contract referring to 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Clause. The provisions of this Clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

"(f) It this contract (as heretofore or hereafter supplemented or amended) contains provisions for Advance Payments and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments clause any unliquidated balance of advance payments is outstanding, then notwithstanding any other provisions of the Advance Payments Clause of this contract the net amount, after appropriate deduction for liquidation of the advance payment of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Clause, and shall thereafter be withdrawn only pursuant to such provisions."

Compiled Laws of Michigan 1948, 211.1

"Property subject to taxation. Section 1. *The People of the State of Michigan enact*, That all property, real and Personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Compiled Laws of Michigan 1948, 211.10

"Annual Assessment. Sec. 10. An assessment of all the property in the state, liable to taxation, shall be made annually in the several townships, villages and cities thereof by the supervisors of the several townships and wards, or in villages and cities where provision is made in the acts of incorporation or charter for some other assessing officer, then by such assessing office, as hereinafter provided."

Compiled Laws of Michigan 1948, 211.40

"Property taxes; lien, priority. Sec. 40. The taxes thus assessed shall become at once a debt due to the township, city, village and county from the persons to whom they are assessed, and the amounts assessed on any interest in real property shall, on the first day of December, for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. And all personal taxes hereafter levied or assessed shall also be a first lien, prior, superior and paramount, on all personal property of such persons so assessed from and after the first day of December in each year for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, and so remain until paid, which said tax liens shall take precedence over all other claims, encumbrances and liens upon said personal property whatsoever, whether created by chattel mortgage, title retaining contract, execution, or upon any other final process of a court, attachment, replevin, judgment or otherwise, and whether such liens, claims and encumbrances created by chattel mortgage, title retaining contract, execution, or upon any other final process of a court, attachment, replevin, judgment or otherwise, become effective prior to the effective date of this act or subsequent thereto, and

transfer of personal property assessed for taxes there-
shall operate to divest or destroy such lien, except
re such personal property is actually sold in the
ular course of retail trade. The personal property
es hereafter levied or assessed by any city or village
ll be a first lien, prior, superior and paramount to
other claims, liens and encumbrances whatsoever upon
personal property assessed as herein provided, any
visions in the charter of such cities or villages to the
rary notwithstanding."

Local Act, Michigan, No. 6, 1943, Sections 1, 2 and 4

Sec. 1. That hereafter when the assessment rolls of
different wards in the city of Detroit, for city taxes,
annually, fully and finally confirmed, as prescribed
he provisions of the city charter, it shall be the duty
he board of assessors of said city to make a copy of
assessment roll of each of said wards, to be known as
state and county tax rolls, upon which said board of
ssors shall, upon receipt of the certificate of the
of the board of supervisors of said county, stating
amount of taxes apportioned to each ward, ratably
s the state and county taxes, as provided by the
ral laws of the state, to each of which tax rolls said
d of assessors shall annex a warrant signed by the
bers thereof directed to the county treasurer com-
ling him to collect from the persons liable therefor the
al sums listed therein as taxes, and which tax rolls
warrants the said board of assessors shall deliver
to the treasurer of said county on or before the tenth
of November in each year."

ec. 2. The county treasurer, upon the receipt of
rolls, shall cause a notice to be published in 3 daily

papers published in said city, stating that said rolls and warrants have been made and deposited in his office by the said board of assessors, and giving the time and manner of payment of such taxes and the penalties prescribed for the non-payment thereof. The treasurer shall also mail, to each taxpayer at his last known address on said tax rolls, a statement showing the description of the property against which the tax is levied and the amount of the tax thereon. Failure to publish said notice or send or receive such notice shall not in any way prejudice the right to collect or enforce payment of any tax. The county treasurer shall, beginning December first of each year, proceed to collect such taxes. He shall receive taxes and issue receipt therefor without interest, charges or penalty on all sums voluntarily paid on or before the fifteenth day of January of the succeeding year; upon all taxes paid after said fifteenth day of January, he shall add a collection fee of 4 per cent. From and after the first day of March next after said assessment, said taxes shall be considered delinquent within the meaning of the general tax statutes, and the county treasurer shall, in addition to said collection fee of 4 per cent, add and collect interest on said tax computed at the rate provided by the general tax laws for the collection of deliquent property taxes."

* * * * *

"Sec. 4. After the fifteenth day of January in each year after taxes upon personal property have been levied and at any time until said personal property taxes assessed on said rolls as aforesaid are paid or are ordered stricken from the rolls as hereinafter provided the county treasurer may collect the same by seizing the personal property so assessed or any other personal property of any person liable for said tax to an amount sufficient to pay such tax, interest, fees and charges for subsequent sale wherever the same may be found in the state, and from which seizure no property shall be exempt. He may sell the property seized to an amount sufficient to pay the taxes, interest, fees and charges at public auction in the city of Detroit or, if seized outside of said city, then in the place where the property is seized. He shall give public notice at least 5 days previous to the sale by posting written or printed notices in 3 public places in the city, village or township where the sale is to be made, which sale may be adjourned from time to time as said treasurer may deem necessary. If the property cannot be sold for want of bidders, it shall be returned, and the tax shall remain due as though no seizure was had. If the property sold brings more than the amount of taxes, interest and charges, the balance shall be returned to the person from whose possession the property was taken. After the fifteenth day of January in each year after said taxes upon personal property have been levied, and at any time until said personal property taxes assessed on said rolls as aforesaid are paid or ordered stricken from the rolls as hereinafter provided, the county treasurer may sue in the name of the county of Wayne the person or persons liable for said tax on personal property by action in any court of law, and he shall have, use and take all lawful ways and means provided for the collection of debts to enforce the payment of such tax. The tax rolls shall be *prima facie* evidence of the indebtedness by such person and of the regularity of the proceedings by which such tax was assessed and levied. In case the county treasurer may be apprehensive of the loss of any personal tax assessed upon his roll, he may proceed at any time to enforce its collection as aforesaid, and if compelled to seize property or bring suit, may add interest and collection fees in accordance with the general tax laws, up to the date of sale or judgment, in addition to the charges for sale and suit."

Section 1, Chapter II, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. Assessments shall be made according to assessment districts, the boundary lines of which shall conform to ward boundaries as established from time to time by the common council. There shall be an assessment roll in book form for each such district. All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not."

Section 2, Chapter II, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"In all assessments, the lands, tenements and subdivisions assessed shall be described by referring to the number and section of the lot and the name of the owner or occupant thereof, and if the number and section of any lot, or the name of the owner thereof can not be ascertained, then by such other sufficient description as the board of assessors may deem proper. If, by mistake or otherwise, any person may be improperly designated as the owner of any lot, tenement, or premises, such assessment or tax shall not for that cause be vitiated, but the same shall be a lien on such lot, tenement or premises, and collected as in other cases. If any lot or lots shall lie partly in two or more districts, the same shall be assessed in the district where the greater portion of said lot or lots is situated."

Section 6, Chapter II, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"The council or committee shall hear and determine all appeals in a summary manner and correct any errors which they may discover in the assessment rolls; shall place thereon the names of any persons and the descriptions of any property not already assessed and assess the same; and may increase or diminish any assessment as they see fit: Provided, that the counsel or such committee shall not increase any assessment without giving a reasonable opportunity to persons owning or having charge of the same, if known, to appear and object thereto. The consideration of the assessment rolls and hearing of appeals may be continued from session to session for a period not less than five days or exceeding sixteen days after the date of their delivery to the council. The committee shall make a report to the common council in the premises and the council may adopt, change or amend the same, in whole or in part. After due consideration thereof, said rolls shall be fully and finally confirmed by the council, and shall remain as the basis, according to property valuation, of all taxes to be levied and collected in the city until another assessment shall have been made and confirmed as herein provided. In the event that any date set forth in this chapter falls on a Sunday or legal holiday, such time shall be extended to the next succeeding business day."

Section 7. Chapter II. Title VI. Charter of the City of Detroit, 1918 (1952 Ed.)

"Sec. 7. After the assessment rolls shall have been fully and finally confirmed, it shall, as herein provided, be the duty of the board of assessors to cause the amount of all taxes, in dollars and cents, authorized to be assessed and collected in each year, to be ratably assessed to each person named or lots described, upon and according to the aggregate valuation which such person or lots shall have been assessed in said assessment rolls. Such ratable assessments shall be entered in a book prepared for that purpose to be known as the tax roll for each district, in a column showing the amount of city taxes assessed to each person or lot in each year. Such tax rolls shall contain columns for the names and addresses of all persons assessed hereunder. When said tax rolls shall have been completed, the board shall deliver the same to the controller, who shall cause the same to be delivered to the city treasurer on the first day of July, take his receipt therefor and charge him therewith. All city taxes shall become a debt against the owner from the time of the listing of property for assessment by the board of assessors."

Section 1, Chapter IV, Title VI. Charter of the City of Detroit, 1918 (1952 Ed.)

"All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed. The owners or occupants or parties in interest to any real estate assessed hereunder shall be liable to pay such taxes, and all assessments levied in accordance herewith. The owners or persons in possession of any personal property shall pay all taxes assessed thereon."

Section 26, Chapter IV, Title VI, City Charter, 1918
(1952 Ed.)

"On and after the 26th day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other that real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining thereafter shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid and no transfer of the personal property assessed shall operate to divest or destroy such lien."

Section 27, Chapter IV, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"All city taxes upon personal property and real estate and special assessments thereon in addition to being a lien upon the property assessed shall become a debt against the owner from the time of the listing of the property for assessment, and shall remain a debt against the owner of the property or his estate after his death, until the same are paid."

(P. 608)

(§1307) W. D. Contract Form No. 7

LETTER ORDER FOR SUPPLIES

(No Price Stated)

Contract No. ....
(Negotiated)

Date ....

Place ....

....
(Contractor)

....
(Address)

Gentlemen:

(§1307.1) 1. An order is hereby placed with you for the manufacture and delivery to the Government of the following supplies:

....

....

....

(§1307.2) 2. You are directed, upon your acceptance of this order, to proceed immediately to furnish the necessary materials, jigs, dies, fixtures, and gages, and other machinery and equipment,[1] and to commence the manufacture of the supplies called for in paragraph 1, and to pursue such work with all diligence to the end that the supplies may be delivered to the Government at the earliest practicable date.

(§1307.3) 3. All applicable articles (other than the article "Termination for the Convenience of the Government") now required by Federal Law, Executive Order, or War Department Procurement Regulations to be included in contracts for supplies of the kind herein described are incorporated herein by reference.

(§1307.4) 4. By your acceptance hereof, you undertake without delay to enter into negotiations with the War Department looking to the execution of a definitive contract which will follow in the main War Department Contract Form No. 1[1] and will include all applicable articles then required by Federal Law, Executive Order, and War Department Procurement Regulations to be included in contracts for supplies of the kind herein described. The definitive contract will also contain a detailed delivery schedule and prices, terms and conditions as agreed to by the parties, which may or may not be at variance with the provisions of this order.

(Footnote §1307.2) (1) As to cases where it is anticipated that the contractor will have to purchase machinery or equipment (other than jigs, dies, fixtures, and gages) in an estimated amount of more than $100,000, see paragraph 1008.)

(Footnote §1307.4) (1) With appropriate modifications, this letter order may also be used where the definitive contract is to be written on a fixed-price contract form for supplies other than W. D. Contract Form No. 1.)

(§1307.5) (5) Pending the execution of a definitive contract, each expenditure, order, subcontract or commitmen made by you in furtherance of the performance of thi order—

(a) for machinery or equipment other than jigs, dies, fixtures or gages, or

(b) for an amounts in excess of............Dollar (\$.........), will be subject to the written approval o the Contracting Officer, and you are not authorized t expend or obligate, in furtherance of your performanc hereunder, more than............Dollars (\$........) in the aggregate.

(§1307.6) 6. (a) In case a definitive contract is not executed by................, 19.... (or any subsequent dat at any time mutually agreed upon) because of the inability of the parties to agree upon a definitive contract, this orde will terminate on the stated date or such subsequent date as the case may be.

(b) The Government may at any time terminate thi order in whole or in part for its convenience by giving yo written notice of such termination.

(c) In the event of any termination pursuant to either paragraph 6 (a) or paragraph 6 (b) of this order, you an the Contracting Officer will attempt to agree by negotiatio upon a settlement estimated by the parties to be the aggregate amount (less payments previously made to you) of th costs incurred by you in the performance of this order an the amounts paid or to be paid by you or for your accoun in settling with the approval of the Contracting Officer you obligations for commitments made in the performance o this order. *In case of termination pursuant to paragraph 6 (b), such negotiated settlement may include a reasonable allowance for profit.* Any such negotiated settlement shall be embodied in a Supplemental Agreement.

(d) If you and the Contracting Officer are not able to agree upon such a negotiated settlement within 90 days after the effective date of the termination (or within such longer period as at any time may be mutually agreed upon), the Government binds itself (without duplication of any of the following payments or of payments previously made) to reimburse you for the costs incurred by you in the performance of this order and for any amounts paid by you or for your account in settling with the approval of the Contracting Officer your obligations for commitments made in the performance of this order. In lieu of reimbursing you for expenditures made by you in settling any of your obligations for commitments, the Government, in the discretion of the Contracting Officer, may assume such obligations or any of them. The total of such reimbursement (and of all payments previously made), together with the amount of any obligations assumed, shall not exceed the amount above specified.

If such termination shall take place pursuant to paragraph 6 (a) of this order no allowance of profit will be made to you. If termination shall take place for the convenience of the Government pursuant to paragraph 6 (b) of this order, such allowance of profit will be made to you with respect to the work done by you prior to the effective date of the termination as the Contracting Officer may find to be reasonable under all the circumstances.

(e) The Government may permit you to sell or retain at prices or on terms agreed to by the Government any equipment, completed supplies, materials or work in process and the proceeds of any such sale, or such agreed prices, shall be paid or credited to the Government in such manner as the Contracting Officer may direct.

(f) Upon payment or reimbursement to you pursuant to paragraph 6 (c) or 6 (d) of this order, title to all equipment, completed supplies, work in process, materials, plans, information, and other things, for which you are so paid or reimbursed (except such property as may be sold or retained by you as above provided) will vest in the Government (if title thereto has not already become vested in the Government). The Government will also become entitled to any rights under any commitment which it may assume, or for the settlement of which it shall have reimbursed you.

(g) Any dispute which arises under this paragraph 6 regarding the matter of fact *(including any dispute* (1) *as to whether termination has in fact taken place for the convenience of the Government or because of the inability of the parties to agree upon a definitive contract, or* (2) *as to the extent of any allowance of a profit in the event of a termination for the convenience of the Government)* will be treated and resolved as a dispute under the "Disputes" article[1] incorporated in this order by reference.

(h) Partial payments on account of any amount admittedly due to you pursuant to this paragraph 6 may be made by the Government at any time in the discretion of the Contracting Officer.

(§1307.7) 7. After your acceptence hereof, partial and advance payments, in accordance with regulations from time to time applicable, may be made to you upon your application.

(§1307.8) 8. The sums to be expended by the Government hereunder are chargeable to the following allotments, the available balances of which are sufficient to cover the same:...

(§1307.9) 9. Your acceptance of this order will be indicated by affixing your signature to this letter and two copies thereof, and mailing or delivering the executed original and one executed copy to the Contracting Officer not later than ...., 194..... Such acceptance will constitute this order a contract on the terms set forth herein.

(§1307.10) 10. This instrument is authorized by and has been negotiated under the First War Powers Act, 1941, and Executive Order No. 9001.

United States of America
By.......................
....
(Official Title)
(Corporate Seal)

Accepted................., 19....
....
(Contractor)
By.... ....
(Title)
....
(Address)

(Footnote §1307.6) (1) Where the letter order is for an amount less than $20,000, the "Disputes" article will not have been incorporated by reference by virtue of paragraph 3 or 6 (g) of this letter order, since contracts in such amount are not required to contain that article (see paragraph 326). In that event the language of the letter order will be appropriately modified expressly to incorporate by reference either the "Disputes" article set forth in paragraph 326 or that contained in General Provision 12 of W. D. Contract Form No. 18 (paragraph 1317-B.2).

Opinion, Attorney General of Michigan 1928-30, p. 176

TAXATION: (a) A personal property tax is an assessment against the person rather than the property.

(b) Personal property assessments against executors and administrators make them personally liable for the amount of the tax where the estate is permitted to be closed and distributed without payment thereof.

January 8, 1929.

Mr. Raymond R. Kendrick,
City Attorney,
Saginaw, Michigan.

Dear Sir:

Your letter of December 17th propounds the following query:

> "A question has arisen as to whether or not the estate of a deceased person which is closed, its assets distributed and the administrator discharged, subsequent to the final completion of the assessment rolls and before taxes levied upon the assessment fall due, is liable for such taxes subsequently falling due. If such liability exists, from whom can collection be made?
>
> "A similar question arises with reference to corporations which are dissolved or go out of existence during the period after the assessment rolls are made up."

You state that your inquiry relates solely to personal property.

Section 14 of Act No. 206, Public Acts of 1893, as amended, being the General Tax Law, provides in part as follows:

> "* * * Fifth, The personal property belonging to the estates of deceased persons, in the hands of the executors, administrators or trustees, appointed under the last will and testament of such deceased person, or by any court of competent jurisdiction, shall be assessed to them in the township and in the school district where the deceased last dwelt, until they shall give notice to the supervisor or other assessing officer that the estate has been distributed to the legatees or beneficiaries or other persons entitled thereto. If such deceased was a non-resident of the State such property shall be assessed in the township where situated, to such executors, administrators or trustees, or to the person in possession; * * *"

Section 17 of the law provides that:

> "No change of location or sale of any personal property, after the first day of May in any one year shall affect the assessment made in such year. * * *"

It is thereupon provided by Section 40 that:

> "The taxes thus assessed shall become at once a debt to the township, ward or city from the persons *to whom they are assessed,* * * * And all personal taxes shall also be a lien on all personal property of such persons so assessed from and after the first day of December in each year, * * *"

In addition to the remedy of seizure, distraint and sale provided by law in case of non-payment of such taxes, the township treasurer is authorized by section 47:

> "* * * if otherwise unable to collect a tax on personal property, may sue the person, firm or corporation to whom it is assessed, in the name of the township, village or city, and garnishee any debtor or debtors of such person, firm or corporation. The tax roll shall be prima facie evidence of the debt sought to be recovered: * * *"

In considering these provisions it should be borne in mind that a personal property tax is distinguished from a real estate tax in that the former is an assessment against the person, while the latter is against the property. Thus, in *Lucking v Ballantyne*, 132 Mich. 584, the court said:

> "In the case of a tax on land, it may be stated as a general proposition that the land, and not the owner, is taxed. Purchasers and all persons interested in land understand this, and must pay the taxes as a condition of enjoying their property. It is otherwise with personal property. There the tax is against the person, because he owns personal property. It has always been the policy of the law—supposedly in the interest of trade—to make personal property easily transferable, and to secure to purchasers and mortgagees the entire title of the seller and mortgagor."

See also:

> *St. Johns National Bank v. Township of Bingham*, 113 Mich. 203;
>
> *City of Muskegon v. County of Muskegon*, 123 Mich. 272;
>
> *City of St. Joseph v. Vail*, 137 Mich. 276.

In the early case of *Dresden v. Bridge*, 90 Me. 489, 38 Atl. 545, which has apparently become a leading case on the subject, it was held that where a statute provides for the assessment of personal property of deceased persons, not distributed, to executors or administrators, "such assessment makes the executor or administrator personally liable to the taxes. Being personally liable, a suit for the taxes should be brought against him personally and not against the property of the deceased in his hands".

This theory has been adopted and affirmed in the decisions of a great many States and the Supreme Court of our State made a like holding in Township of Orien v. Axford, 112 Mich. 179. In this case the court said:

> "The sole question which need be discussed in this case is whether, under the tax law of 1893, a tax property assessed against the executor of an estate may be recovered in a personal action against him, it appearing that he has distributed the estate after the assessment and before the action brought."

These facts would seem to fit the situation presented by you squarely. In holding the executor liable, the court said:

> "The plain provisions of these sections leave little room for construction. Manifestly, the executor is 'the person to whom the tax is assessed,' within the meaning of this section. Not only is this true, but there is no other person to whom the property can be assessed, in a case like the present, where no notice has been given that the estate has been distributed to the parties interested. If then, the tax cannot be recovered of the executor or administrator, it cannot be recovered at all; and such a legislative purpose is not to be inferred. It is idle to suggest that the township must

> resort to the method of filing a claim against the estate. * * * The only way in which this statute can be made effective is to so construe it that the executor, when closing the estate, must provide for current taxes, or, being required to pay the taxes on the estate after distribution, must resort to the distributees for reimbursement."

From a consideration of the foregoing, I am of the opinion that an executor or administrator who permits an estate to be closed and distributed without regard to current assessments against the personal property in his hands, become personally liable for the amount of the same in an action by the municipal corporation to whom the tax is due.

In so far as corporations are concerned, where a dissolution takes place after the assessment, it would seem that this class of tax would fall into the same category as other debts of the corporation to be paid or accounted for as are other debts, having due regard to the provisions of law entitling such obligations to priority, of course, over general claims. The exact order of priority would necessarily have to be determined by reference to the law under which the dissolution takes place. The additional right of the tax collector to assess personal property of the corporation assessed is also available where there are assets.

Yours very truly,

Wilber M. Brucker,
Attorney General.

CR

WARD................

CITY OF DETROIT
PERSONAL PROPERTY ASSESSMENT ROLL

Line	Item Number	Owner or Taxpayer Address	Business and Sales Tax Number	Assessment 1951	Assessment 1952	Statement Filed	Accepted or Not Accepted	Field Appraiser	True and Lawful Assessment Determined by the State Tax Commission
13	639	Murray Corp of America 7700 Russell Detroit 11, Mich	7 Auto C Body 119259	11,155,750	~~11,200,000~~ ~~10,290,000~~ 12,183,180	Feb 15	Assessed Subject to Prior Rights of Federal Government B. of R. 1952 Pet. No. 825 Placed at 12,183,180 Accepted Board of Assessors	R. Howey	Reg. #7821

7

No.
18

SUPREME COURT OF THE UNITED STATES

[illegible] Term, 19[illegible]

[illegible]

[illegible]

INDEX

Page

Petition for leave to file a brief *amicus curiae* 1

Brief *amicus curiae* 1

Conclusion 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. ———

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate,

Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, and THE UNITED STATES OF AMERICA, Intervenor,

Appellees.

PETITION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The City of Milwaukee, a municipal corporation organized and existing under the laws of the State of Wisconsin and its own special charter, pursuant to Rule 42, hereby petitions for leave to file a brief *amicus curiae.*

BRIEF AMICUS CURIAE

The City of Milwaukee is the largest municipality in the State of Wisconsin, having a population in excess of 650,000 people. Together with the urban area surrounding Milwaukee there are in excess of 900,000 people in the employment of various industries in the Milwaukee urban area. The City of Milwaukee and its environs compose the industrial, financial and transportation hub of the State of Wisconsin, a state which in the last 10 years has changed from a state having an essentially farm and agricultural economy to one being supported by industry in ever-increasing measure.

Contrary to popular belief, the basic Milwaukee industry is not the brewing industry, although that produces a large number of jobs. The heavy machinery and machine tool industry in Milwaukee and other metal fabricating industries, such as foundries, compose the greatest and steadiest source of income to Milwaukee families and to the governments which control the Milwaukee metropolitan area. These industries provide many of the necessities for the defense of this country.

This case presents a problem with which the City of Milwaukee will be faced in an ever-increasing amount. If the defense mobilization progresses many of our industries will be furnishing materials and supplies either as prime contractors or sub-contractors and if the contracts involved in this case are applied to the City of Milwaukee, it is conceivable that many millions of dollars of valuation will be removed from the local tax base. If this should happen the urban areas which produce defense materiel will be hard pressed to provide the necessary services to make the production of these products possible. Such services consist of water and sewer, adequate streets to provide easy access by trucks, traffic control, police and fire protection and schools for the children of those who are employed in such industries.

While it is not possible to get an accurate figure of the dollar value of contracts which could conceivably contain the partial payment and title passage clause, a survey was conducted by the Tax Commissioner of the City of Milwaukee, as a result of which he estimated that there could be 20 million dollars of value conceivably affected by this provision in the law. It was the Tax Commissioner's recommendation to the Mayor and Common Council of the City of Milwaukee that attempts be made to legislate the answer to this problem but efforts along that line have not been pre-eminently successful.

Ad valorem taxes have been and will no doubt remain to be the basic medium for raising money by municipalities. It is true, of course, that returns on state income taxes and collections on licenses and other miscellaneous income of the city do make up a proportion of the revenue of a municipality and this revenue in prosperous times is substantial, nevertheless our experience has pointed up the fact that the stability of the ad valorem tax base gives the greatest security and reliability and consequently the basis upon which all municipalities proceed is a strengthening and preservation of the ad valorem tax base. It is to this end that cities are engaging in slum clearance and blight elimination and it is for this purpose that expensive facilities as expressways are being constructed.

In the City of Milwaukee it apparently is not common for federal procurement officers to use partial payment and title passage contracts. Many of our manufacturers for one reason or another prefer to finance their efforts by other means. We cannot, however, escape the fact that there will be a tremendous impact on the ad valorem tax base in the event of a national emergency or a speed-up in the defense effort. It should also be pointed out that the contracts referred to permit manipulation between the sub-contractor, the prime contractor and the federal government with the sole purpose in mind of escaping local taxation. Furthermore, these contracts permit one manufacturer to obtain competitive advantage over other manufacturers and allow certain manufacturers who are substantially or wholly engaged in defense efforts from escaping their share of local taxation to the detriment of all other manufacturers in the same competitive vicinity.

We want to emphasize most strongly that our interest in this matter does not go to the point that local governments should tax the finished product upon which title has passed because of completion nor do we want to take the position that defense materiel being used in the defense of this country should be taxable locally. All that we are interested in is placing on the local tax roll inventories, work in process and tools. It would seem that the Federal Government could be just as adequately protected by following the terms of the statute (Title 41, Para. 154, U.S.C.A.) rather than by actually taking title upon a partial payment. Thus the City of Milwaukee has no intention at this time of presenting for legislation or urging that airplanes, guns, tanks and other military facilities be taxed or be made part of the local tax base.

It should also be pointed out that the federal contract referred to in this case leads to many administrative difficulties by way of assessment. The Tax Assessor does not know when he goes into a factory that a certain machine is part of a contract or whether it is not, and there is no way of adequately furnishing proof one way or another as to whether a certain item is or is not covered by a partial payment and title passage contract. Furthermore, if the assessor makes a mistake and places property on the roll which should not be there his action affects the tax base of the total assessable property in the community which is used to establish the rate and the result is a rate which is faulty. Furthermore, the municipality will be faced with the probability that it will have to refund large amounts of money with interest as a result of such an honest mistake.

The jurisdictional statement of the City of Detroit and the County of Wayne adequately sets out the legal basis for the city's position and we are sure that the eminent counsel for these taxing authorities will expand on the statement when their briefs are filed and when oral argument is made before this court. Since our position necessarily is the same as other cities, and especially the City of Detroit and the County of Wayne, we adopt their argument as presented.

CONCLUSION

We would like to urge the Supreme Court of the United States to hear this matter, both on briefs and oral argument, because the federal questions presented by the appeal are substantial and of extreme public importance to not only the City of Detroit and the County of Wayne but to all municipalities which have a substantial industrial establishment.

Respectfully submitted,

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8

Nos.
18
36

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Nos. 18 and 36

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, APPELLANTS AND PETITIONERS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutes involved 3

Statement 3

Summary of argument 11

Argument 14

- I. The Federal Government contracting officers clearly possessed the authority to contract to make partial payments during the progress of work under a Government contract which provided that such payments are conditioned on the United States' obtaining at the same time ownership of the property produced or acquired under the contract 15
  - A. Section 3648, Revised Statutes, as amended, does not prohibit the making of partial payments 19
  - B. The Armed Services Procurement Act of 1947 authorizes the making of partial payments 22
- II. The United States acquired full ownership of the property with the receipt by the Murray Corporation of partial payments 31
- III. Property of the United States is immune from local taxation 43

Conclusion 46

Appendix 47

Cases:

Alabama v. *King & Boozer*, 314 U. S. 1 45

Alaska Steamship Co. v. *United States*, 290 U. S. 256 22

American Boiler Works, In re, 220 F. 2d 319 .... 14, 32

American Motors Corp. v. *City of Kenosha*, 274 Wis. 315 .... 15, 32, 34

Carpenter v. *Shaw*, 280 U. S. 363 44

Cases—Continued

Page

Commissioner v. *South Texas Co.*, 333 U. S. 496, 501 ... 22, 31
Craig v. *Ingalls Shipbuilding Corp.*, 192 Miss. 254 ... 14, 32
Douglas Aircraft Co. v. *Byram*, 57 Cal. App. 2d 311 ... 14, 32, 42
Esso Standard Oil Co. v. *Evans*, 345 U. S. 495 ... 45
Fawcus Machine Co. v. *United States*, 282 U. S. 375 ... 31
Graves v. *New York, ex. rel. O'Keefe*, 306 U. S. 466 ... 45
James v. *Dravo Contracting Co.*, 302 U. S. 134 ... 45
Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110 ... 11, 13, 17, 18, 23, 29, 43, 44
Lee v. *Osceola Imp. Dist.*, 268 U. S. 643 ... 44
Maryland Casualty Co. v. *United States*, 251 U. S. 342 ... 31
Mayo v. *United States*, 319 U. S. 441 ... 43
Oklahoma Tax Commission v. *Texas Co.*, 336 U. S. 342 ... 45
Read-York, Inc., In re, 152 F. 2d 313 ... 14, 32, 33
S. R. A., Inc. v. *Minnesota*, 327 U. S. 558 ... 33, 45
State ex rel. Superior S. B. Co. v. *Beckley*, 175 Wis. 272 ... 14, 32
Thomson Mach. Works Co. v. *Lake Tahoe Marine Sup. Co.*, 135 F. Supp. 913 ... 14
Union Bridge Co. v. *United States*, 204 U. S. 364 ... 18
United States v. *Algoma Lumber Co.*, 305 U. S. 415 ... 32
United States v. *Allegheny County*, 322 U. S. 174 ... 13, 17, 19, 31, 43, 44, 45
United States v. *Ansonia Brass &c. Co.*, 218 U. S. 452 ... 14, 20, 22, 30, 31
United States v. *Arizona*, 295 U. S. 174 ... 19
United States v. *Birdsall*, 233 U. S. 223 ... 18
United States v. *Bradley*, 10 Pet. 343 ... 17
United States v. *Corliss Steam-Eng. Co.*, 91 U. S. 321 ... 18
United States v. *Eliason*, 16 Pet. 291 ... 31
United States v. *Lennox Metal Mfg. Co.*, 225 F. 2d 302 ... 15, 32
United States v. *Linn*, 15 Pet. 290 ... 17
United States v. *Macdaniel*, 7 Pet 1 ... 18
United States v. *Maurice*, 26 Fed. Cas. 1211, 2 Brock. 96 ... 17
United States v. *Mora*, 97 U. S. 413 ... 18
United States v. *Tingey*, 5 Pet. 115 ... 17
Van Brocklin v. *State of Tennessee*, 117 U. S. 151 ... 17, 44
Wright Co. v. *Glander*, 151 Ohio 29 ... 14

Statutes: Page
- Act of August 22, 1911, c. 42, 37 Stat. 32 .... 20, 25
- Act of October 6, 1917, c. 79, 40 Stat. 345, Sec. 5 25
- Act of June 28, 1940, c. 440, 54 Stat. 676 25
- Act of July 2, 1940, c. 508, 54 Stat. 712 .... 25, 27
- Act of January 12, 1951, c. 1230, 64 Stat. 1257:
  - Sec. 1 16
  - Sec. 2 .... 16, 47
- Air Force Organization Act of 1951, c. 407, 65 Stat. 326:
  - Secs. 101, 404 18
- Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21 .... 11, 12, 16, 19, 21, 22, 23, 24, 30, 47
  - Sec. 2 .... 16, 23, 47
  - Sec. 4 .... 23, 24, 29, 47
  - Sec. 5 .... 25, 28, 30, 47
  - Sec. 7 .... 24, 47
  - Sec. 9 49
- Army and Air Force Authorization Act of 1949, c. 454, 64 Stat. 321, Secs. 203–204 18
- Budget and Accounting Act, 1921, c. 18, 42 Stat. 20, Sec. 212 21
- First War Powers Act, 1941, c. 593, 55 Stat. 838, Sec. 201 .... 16, 25, 27, 49
- Joint Resolution 24, May 5, 1894, 28 Stat. 582, 26 Cong. Rec. pp. 3506–7, 4215, 4216, 53d Cong., 2d Sess 20, 25
- Revised Statutes:
  - Sec. 216, 5 U. S. C. 1952 ed., Sec. 190 18
  - Sec. 3648, 31 U. S. C. 1952 ed., Sec. 529 .... 11, 15, 19, 20, 21, 22, 29, 40, 50

Miscellaneous:
- Armed Services Procurement Regulations (November 23, 1950), Sec. 3.501, 15 Federal Register 8038, 32 Code of Federal Regulations (1949 ed.), Sec. 402.501 26
- Armed Services Procurement Regulations (May 10, 1951), Appendix B, 16 Federal Register 4311, 4324:
  - Sec. 207.1–207.5 40
  - Sec. 301 40

Miscellaneous—Continued

Page

Armed Services Procurement Regulations (February 29, 1952), 17 Federal Register 1791; Sec. 407.221 .. 35

Army Procurement Regulations (November 18, 1947), 12 Federal Register 7670, 7692–7693, 7700, 7704–7705:
  Sec. 801.100 27
  Sec. 804.400–804.407 .... 25, 28
  Sec. 805.405 .... 25, 28
  Sec. 805.407–2 (a) (b) 25, 28

17 Comp. Dec. 231 (1910) 20, 22

17 Comp. Dec. 894 (1911) 19, 20, 22

1 Comp. Gen. 143 (1921) 20, 28, 31

20 Comp. Gen. 917 (1941) 20, 36

28 Comp. Gen. 468 (1949) 20, 21, 22, 36

Department of the Air Force Regulations (August 13, 1953), Secs. 1006.1309, 1006.1310, 18 Federal Register 4796, 4829, 32 Code of Federal Regulations, Secs. 1006.1309, 1006.1310 26

Executive Order 9001 (December 27, 1941), 6 Federal Register 6787 .... 25, 27

Hearings before House Committee on Armed Services in connection with H. R. 1366, 80th Cong., 1st Sess 28, 29

H. Rep. No. 39, 62d Cong., 1st Sess 20

H. Rep. No. 2186, 79th Cong., 2d Sess 22

H. Rep. No. 109, 80th Cong., 1st Sess 24, 26, 29

H. R. 1366, 80th Cong., 1st Sess., 93rd Cong. Record, pp. 460–461, Part 1, p. 640 .... 24, 27, 28, 29

18 Op. A. G. 101 (1885) 19

18 Op. A. G. 105 (1885) 19, 20

18 Op. A. G. 244 (1885) 18

20 Op. A. G. 746 (1894) 19, 20

29 Op. A. G. 46 (1911) 20, 22

29 Op. A. G. 285 (1911) 18

S. Rep. No. 28, 62d Cong., 1st Sess 20

S. Rep. No. 571, 80th Cong., 1st Sess 24, 27

S. Rep. No. 1636, 79th Cong., 2d Sess 22

Miscellaneous—Continued

Page

War Department Procurement Regulations (July 1, 1942), 7 Federal Register 6098, 6105, 6108, 6112, 6113:
  Sec. 81.321 .... 25, 28
  Sec. 81.330 28
  Sec. 81.331 .... 25, 28
  Sec. 81.347 .... 25, 28
  Sec. 81.348 .... 25, 28
War Department Procurement Regulations (August 25, 1945), 10 Federal Register 10449, 10500–10508:
  Sec. 803.319.1 29
  Sec. 803.321 .... 25, 27, 28
  Sec. 803.330 .... 25, 27, 28, 38
  Sec. 803.331 .... 25, 27, 28, 37, 38

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In the Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, APPELLANTS AND PETITIONERS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan (R. 112–122) is reported at 132 F. Supp. 899. The opinion of the Court of Appeals for the Sixth Circuit (R. 271–277) is reported at 234 F. 2d 380.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1956. (R., 271.) Notices of appeal were filed by the City of Detroit (R. 278–280) and the

County of Wayne (R. 281–283) on July 25, 1956. The appeal was filed on September 10, 1956. Both the United States and the Murray Corporation of America filed timely motions to dismiss or affirm. An order of Mr. Justice Reed was entered on September 15, 1956, extending the time for filing a petition for writ of certiorari to and including November 13, 1956. The petition for a writ of certiorari was filed on November 13, 1956. On January 14, 1957, this Court granted the petition for a writ of certiorari and postponed further consideration of its jurisdiction on appeal to the hearing on the merits. (R. 284.) The jurisdiction of this Court on the writ of certiorari rests upon 28 U. S. C., Section 1254 (1). Appellants[1] assert jurisdiction on the appeal under 28 U. S. C., Section 1254 (2).[2]

QUESTIONS PRESENTED

The United States contracted with prime contractors for the manufacture of airplanes and parts for the use of the Air Force. The prime contractors subcontracted certain manufacturing to the Murray Corporation. The subcontracts, as approved by the Air Force Contracting Officer, each contain a clause providing that upon the making of partial payments to Murray, title to all inventories, materials, and work in process acquired or produced by Murray for the performance of the contract would vest in the United States. Following the making of partial payments, appellants assessed *ad valorem* personal property taxes to Murray on account of such property in its possession.

---

[1] Throughout their brief the City of Detroit and the County of Wayne refer to themselves as appellants. We will likewise refer to them as appellants in this brief.

[2] The Government's argument that this Court lacks jurisdiction of the appeal is set forth in detail in the motion of the United States to dismiss or affirm, No. 401, October Term, 1956, to which we respectfully refer the Court.

The following questions are thus presented:

1. Whether the partial payment clause itself was prohibited by any law and therefore ineffectual to vest title in the United States.

2. Whether the title which vested in the United States upon the making of a partial payment was, at most, a "paper" or security title.

3. Whether property of the United States may constitutionally be taxed by state or local authorities merely because it is in the possession of a private contractor and the tax is assessed to the contractor and not directly to the United States.

STATUTES INVOLVED

The statutory provisions involved are set forth in the Appendix, *infra*, pp. 47–50.

STATEMENT[3]

1. *The contracts involved.*—The United States, Department of the Air Force, negotiated a prime letter contract with the Kaiser Manufacturing Corporation for the manufacture of airplanes, parts, tools, and sub-assemblies. (R. 142–168.) Kaiser could subcontract only upon the approval of the subcontracts by

---

[3] The facts are more fully set forth in the brief of the Murray Corporation.

the Contracting Officer of the Air Force. (R. 86.) The Kaiser contract provided for the making of partial payments by the Government to Kaiser upon certain terms and conditions. (R. 153, 161.) It was contemplated that partial payments would also be made to Kaiser's subcontractors following approval by the Contracting Officer of the terms of the subcontract. (R. 161–162.)

On March 23, 1951, Murray entered into a letter subcontract with Kaiser for the manufacture of certain of the parts and sub-assemblies which were required under Kaiser's prime contract with the Government, which subcontract was in effect on January 1, 1952. (R. 168–172.) On August 15, 1951, the letter subcontract, with the written approval of the Contracting Officer, was amended (R. 173–179) to provide for the making of partial payments to Murray upon property acquired or produced by it for the performance of the subcontract in the following terms (R. 174–177):

> 11. *Partial payments.*—Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.
>
> (a) The Contracting Officer may, from time to time, authorize partial payments to The Murray Corporation of America (hereinafter called "the Contractor") upon property acquired or produced by it for the performance of this contract: *Provided,* that such partial payments shall not exceed 90 percent of the cost to the Contractor of the property upon which payment is made, which cost shall be

determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; *Provided further,* that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated partial payments, if any, made under this contract, exceed 80 percent of the contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided,* that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor, Kaiser-Frazer Corporation, or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceed thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions

> of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

In addition to the subcontract which Murray had with Kaiser, it also had, on January 1, 1952, a letter subcontract similar in nature and terms, with Wright Aeronautical Corporation (later Curtiss-Wright), which latter corporation held a prime contract with the Air Force similar to the prime contract of Kaiser. (R. 189–223.)

It was stipulated that in the negotiation of the Kaiser and Wright prime contracts, neither the contractors nor the Air Force considered the possible avoidance of local *ad valorem* and personal property taxes in determining whether partial-payment clauses would be inserted in the contracts. (R. 85.) The actual factors which the parties considered in arriving at a determination to include such partial-payment clauses were the needs of the contractor for partial payments as the work progressed in view of the period of time involved in the performance of each contract, together with the desire of the Air Force to maintain control of material and work in progress during the life of the contract so that such material could be moved elsewhere in the event of nonperformance. (R. 86.) Partial-payment clauses vesting title in the United States upon the making of a partial payment have been included in over 80 percent of fixed-price prime and subcontracts for the production of aircraft for the United States and in substantially a greater percentage of contracts, dollarwise. (R. 86.)

From August 10, 1951, to December 20, 1951, Murray made requests of Kaiser on appropriate Government forms for partial payments under the terms of the subcontract. Following approval by the Contracting Officer, the requests were audited by the Air Force. (R. 47–48.) Prior to January 1, 1952, Murray received partial payments on the Kaiser subcontract in the sum of $163.949.20. Murray made similar requests for partial payments under the Wright subcontract and, prior to January 1, 1952, received $510,827.67 in approved partial payments. (R. 49–51.)

On January 1, 1952, the appellants assessed property in the possession of the Murray Corporation for the purpose of an *ad valorem* tax on its personal property for the year 1952. (R. 112, 116.) Included in the property assessed to Murray by the appellants were parts, materials, inventories, work in process and non-durable tools which had been acquired or produced by Murray for the performance of its letter subcontracts with Kaiser and Wright. This property, upon which partial payments had been made, as stated above, had an assessed value of over two million dollars. (R. 56–57.) Prior to, on, and subsequent to, January 1, 1952, the title to ~~such~~ property was vested in the Federal Government pursuant to the partial-payment clauses of the subcontracts (*supra*, pp. 4–8). Also, during this time the property was clearly identified as being owned by and belonging to the United States by tagging, labeling, or by segregation from other personal property owned by the Murray Corporation—and used by it—in connection with the conduct of its regular business. The aircraft operations of the Murray Corporation were entirely separate from its other operations. (R. 57, 97.) Handling and accounting procedures did not differ following the receipt of partial payments since from the beginning of operations under the subcontracts Murray intended to receive payments under standard partial-payment clauses. (R. 96, 98.) None of the property acquired by Murray for the letter subcontracts was used for any purpose other than performance under those contracts, except in a few isolated instances where Murray, at Government direction, made transfers to other Government contractors. (R. 98.)

2. *The litigation.*—Subsequent to the assessment by the appellants of the 1952 *ad valorem* personal property taxes upon the property here involved, Murray paid the taxes under protest, and brought three consolidated suits for refund, on the theory that the tax was attributable to tax-exempt property of the United States.[4] (R. 3-11, 22, 37-38.) Murray sought refund of $67,714.96, plus interest, from the City of Detroit; and $12,572.66, plus interest, from the County of Wayne. (R. 84.) The United States intervened as a party-plaintiff, claiming ownership of the property on which the assessment was made. (R. 76-81, 117.)

Following the filing of a motion for summary judgment by Murray, supported by stipulations and depositions and the agreement by the parties that there was no genuine issue of any material fact, the District Court entered judgments against the taxing authorities. (R. 122–126.) On appeal, the Sixth Circuit affirmed. (R. 271–277.) On January 14, 1957, this Court granted a petition for a writ of certiorari and postponed the question of its jurisdiction on appeal to the hearing of the case on the merits. (R. 284.)

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[4] The Murray Corporation has not billed the Government nor been directly paid or reimbursed for the personal property taxes here involved. The taxes are, however, an element in both retrospective and prospective price redeterminations under the subcontracts. (R. 99.)

SUMMARY OF ARGUMENT

1. Appellants' contention that the contracting officers of the Air Force were without authority to provide for the making of partial payments whereby the United States acquired ownership of the contract property is without basis in the statutes or the decisions of this Court. Unless there is a statutory direction to follow, or prohibition against, a particular course, the Executive Department may follow any course which it deems to be in the best interests of the Government in procuring authorized materials. *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 116.

There is nothing in the statutes which prohibits the course here followed. Section 3648, Revised Statutes, as amended, which prohibits the making of *advance* payments and which is relied on by appellants, has been interpreted for over sixty years as permitting the making of *partial* payments (which are involved here), provided the United States thereby acquires title to the property on which the payments were made. In addition, with respect to negotiated contracts, the Armed Services Procurement

Act of 1947 gives broad powers to the Secretary of the Air Force to enter into any type of contract, including one calling for the making of partial payments and the vesting of title to the property in the United States. This is in keeping with the War Department Regulations and practice of long standing. At the time the Armed Services Procurement Act was passed, that Department had already issued new regulations anticipating the requirements of the bill which became the law. Those regulations continued in effect the established practice with respect to partial payments. Regulations of such long standing and effect should be sustained.

2. Appellants' assertion that the title of the United States in the property here involved was mere "paper" title and not ownership is not supported by the terms of the contract or the treatment of the property by the parties. The language is clear, to the point, and unequivocally expresses ownership. It is the language which the courts, including this Court, have consistently approved or used to express such a meaning.

Certain clauses pointed to by appellants do not give to the Murray Corporation rights indicative of ownership. When read in their context they support the conclusion that ownership was in the United States, as the partial-payments clause provided. They were included in the subcontracts, not to reduce the quantum of the title held by the Government but to simplify and expedite the transfer of property from the Government.

Appellants' assertion that partial payments represent a form of financing is true but entirely consistent with the Government's acquisition of title. By such payments a contractor is reimbursed for most of the capital which he must advance for materials and labor to perform his contract. His need for capital is thereby reduced. The fact that the Government has reimbursed him for the major part of the cost of producing the property, however, does not raise an inference that the parties intended, contrary to the contract terms, that the ownership of the property should remain in the contractor and the United States acquire merely a security title. Ownership of the property itself is the only means whereby the Government can maintain necessary control over defense material in process of production, and the best means whereby the Government's investment in the property may be recovered.

3. The property on which the *ad valorem* property taxes were here assessed, being property of the United States, is immune from taxation by appellants. Such property is not subject to local property taxation merely because the property is in the possession of another, or merely because the tax is to be paid by a private party. *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. Neither form nor nomenclature of a tax is controlling over substance. If the tax is in substance a tax on the property of the Federal Government, the tax must fail.

ARGUMENT

The ultimate issue in this case involves the constitutional right of local taxing authorities to assess an *ad valorem* tax on property of the United States, the property consisting of inventories, materials, and work in process in the possession of a subcontractor, title to which had passed to the United States when the subcontractor received partial payments on the contract as work progressed. Because of various arguments advanced by the appellants, it becomes necessary to first dispose of their assertions that real title did not pass, and that the property in question did not belong to the United States. We shall then show why the immunity of the United States precludes the imposition of the contested tax.

With respect to the preliminary question, it is undisputed that, by giving the terms of the applicable contracts their customary meaning,[5] ownership of the property involved had passed to the United States at the time the property was taxed to the Murray Corporation. *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452; *In re Read-York, Inc.*, 152 F. 2d 313 (C. A. 7th); *Douglas Aircraft Co.* v. *Byram*, 57 Cal. App. 2d 311; *Craig* v. *Ingalls Shipbuilding Corp.*, 192 Miss. 254; *State ex rel. Superior S. B. Co.* v. *Beckley*, 175 Wis. 272. Cf. *Wright Co.* v. *Glander*, 151 Ohio 29; *In re American Boiler Works*, 220 F. 2d 319 (C. A. 3d); *Thomson Mach. Works Co.* v. *Lake Tahoe Marine Sup. Co.*, 135 F. Supp. 913 (N. D. Calif.);

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[5] See, *e. g.*, Paragraph 11 (b) of Kaiser's contract with Murray. (R. 175.)

nited States v. *Lennox Metal Mfg. Co.*, 225 F. 2d 02 (C. A. 2d). But see *American Motors Corp.* v. *ity of Kenosha*, 274 Wis. 315, pending on appeal in his Court, No. 343, this term. Appellants' princi-al contentions are: (1) the contract provisions by hich title passed must be disregarded because the overnment procurement officers lacked Congressional uthority to include such provisions in the contracts, r (2) if title passed to the United States, then by eason of other provisions in the contract and the onduct of the parties, the titie of the United States vas merely a "paper title" and the real or beneficial itle was vested in the Murray Corporation.

I

THE FEDERAL GOVERNMENT CONTRACTING OFFICERS CLEARLY POSSESSED THE AUTHORITY TO CONTRACT TO MAKE PARTIAL PAYMENTS DURING THE PROGRESS OF WORK UNDER A GOVERNMENT CONTRACT WHICH PROVIDED THAT SUCH PAYMENTS ARE CONDITIONED ON THE UNITED STATES' OBTAINING AT THE SAME TIME OWNERSHIP OF THE PROPERTY PRODUCED OR ACQUIRED UNDER THE CONTRACT

In taking the position that the Air Force officers were without authority to provide for the making of partial payments conditioned on the acquisition of ownership of the contract property, appellants rely (Br. 28–29) on what they claim to read as prohibitions contained in Section 3648, Revised Statutes, as amended (Appendix, *infra*, p. 50), and (Br. 29–32, 46) on the alleged lack of express authority in the Armed Services Procurement Act of 1947, 62 Stat.

21 (Appendix, *infra,* pp. 47–49).[8] The lack of an express statutory authority in the latter Act, they suggest (Br. 33–37), becomes more compelling in their favor by reason of what they read in other acts as clear indications of a Congressional policy to permit only the taking of a lien to secure the payments made.

It is our view that there is more than ample authority for the Government's making partial payments based on the progress of the contract and, at the same time, acquiring title to all of the property involved. Further, when we refer to the term "title," as used in the contracts, we mean ownership of the property and not a mere lien for security purposes. We might also point out that appellants do not appear to understand our position as to the source of the Government's authority for making such partial payments. Contrary to their belief (Br. 29), the Government does not need to and does not rely solely on author contained in the Armed Services Procurement Act of 1947. However, if needed, we submit that authority is present in that Act. It is the Government's position that unless there is some statutory direction to follow a particular course, or there is some prohibition of a particular course, the Executive Department involved may follow any course which it deems to be in the best interests of the Government in procuring the authorized materials (*Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 116), including the making of partial payments and the acquisition, thereby, of property.

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[8] Appellants apparently concede (Br. 36) that authority existed for the disputed provision under the First War Powers Act of 1941. Title II, First War Powers Act of 1941 (c. 593, 55 Stat. 838), as amended by Sec. 1 of the Act of January 12, 1951, and extended by Section 2 of that Act, c. 1230, 64 Stat. 1257 (Appendix, *infra*, pp. 49–50). Since, however, the Government chose to cite in the contracts (R. 143, 191) as its authority, the Armed Services Procurement Act of 1947, Sec. 2 (c) (10) (Appendix, *infra*, pp. 47–49), and to follow the procedures which were established under the authority of that Act, appellants seem to believe that the authority under the First War Powers Act became inoperative (Br. 36). We submit that the First War Powers Act clearly authorized the partial-payment clauses here in issue, but the Court need not reach that question in this case because of the authority which clearly exists under the Armed Services Procurement Act of 1947.

The capacity of the United States to enter into contracts is co-extensive with the duties and powers of Government (*United States* v. *Maurice*, 26 Fed. Cas, 1211, 1217; 2 Brock. 96, 110 (C. C. Va.)) and, within the constitutional powers confided to it, the United States through the proper department or agency may enter into contracts not prohibited by law which are appropriate to the exercise of those powers. *United States* v. *Tingey*, 5 Pet. 115, 127; *United States* v. *Bradley*, 10 Pet. 343, 359; *United States* v. *Linn*, 15 Pet. 290, 315–316; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 154; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*. Since the contracts involved arise from the war and defense powers delegated to the Federal Government, they clearly are authorized by the Constitution (*United States* v. *Allegheny County*, 322 U. S. 174, 182), and certainly there was no lack of adequate Congressional authorization to acquire the property in question. In 1950, the Air Force was authorized by Congress to procure 24,000 serviceable aircraft or

225,000 airframe tons aggregate of serviceable aircraft, together with guided missiles, spares, spare parts, equipment and facilities for the maintenance and operation of the Air Force.[7]

Necessarily, many decisions had to be made by the Air Force on a variety of questions before the authorization could be translated into actual defense materials. As we have pointed out, in the absence of any prohibition of law, if the Authorization Act were the only law on the subject, its directive would have been carried out by the Air Force in the manner thought to be most appropriate. Whether the aircraft would be large or small, of a particular design, their cost, their method of procurement, the terms of the contracts, the methods of financing the manufacture, if necessary, and all other details relating to the procurement would have been determined by the Air Force. *United States* v. *Corliss Steam-Eng. Co.*, 91 U. S. 321, 322–323; 18 Op. A. G. 244 (1885); 29 Op. A. G. 285, 286 (1911). These details are incidents of the general authority to obtain the defense equipment which Congress directed to be procured, and they need not be set forth in legislation.[8] *United States* v. *Macdaniel*, 7 Pet. 1, 14; *United States* v. *Mora*, 97 U. S. 413, 420–421; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 385–386; *United States* v. *Birdsall*, 233 U. S. 223, 231, 235; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*. We think it clear that there is no basis for the proposition that an express statutory direction or permission must exist before partial payments may be made under the circumstances here. If appellants so contend, and their argument (Br. 30–31) based on *United States* v. *Arizona*, 295 U. S. 174, would seem to so indicate, their position is without authoritative support.

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[7] Army and Air Force Authorization Act of 1949, c. 454, 64 Stat. 321, Secs. 203–204.

[8] See also: Section 216, Revised Statutes, 5 U. S. C. 1952 ed., Sec. 190; Air Force Organization Act of 1951, c. 407, 65 Stat. 326, Secs. 101, 404.

Therefore, unless there is some law which prohibits them, the acts of the Contracting Officers of the Air Force in approving the use of partial payments, and the transfer, therewith, of the ownership in the material and work in question, must be accepted as being within their authority. *United States* v. *Allegheny County, supra*, p. 182.

Concerning this point, appellants urge (Br. 28–29) that Section 3648, Revised Statutes, as amended, expressly, and the Armed Services Procurement Act of 1947, by implication, prohibit the making of partial payments where the United States takes title to the work.

A. SECTION 3648, REVISED STATUTES, AS AMENDED, DOES NOT PROHIBIT THE MAKING OF PARTIAL PAYMENTS

Section 3648, as amended, prohibits the making of *advance* payments of any kind. It also prohibits payments being made on a contract under circumstances where the Government does not at the time receive an equivalent. 18 Op. A. G. 101; 18 Op. A. G. 105. Also, it is at least doubtful, lacking an enabling statute, whether payments may be made on an uncompleted contract where only a lien is taken on the property for security purposes.[9] 20 Op. A. G. 746; 17 Comp. Dec. 894. So far as we have been able to learn, however, the right of Government officers to make partial payments under a contract, provided the United States receives ownership of property of an equal value by title to the work in progress vesting in the United States at the time of the payment, has never previously been questioned. 18 Op. A. G. 105 (1885); 20 Op. A. G. 746 (1894); 29 Op. A. G. 46 (1911); 17 Comp. Dec. 231 (1910); 17 Comp Dec. 894 (1911); 1 Comp. Gen. 143 (1921); 20 Comp. Gen. 917 (1941); 28 Comp. Gen. 468 (1949). Compare: *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452. As was said by the Comptroller General with respect to an earlier airplane contract (1 Comp. Gen. 143, 145–146 (1921)):

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[9] Such doubts have never been authoritatively settled. In those cases where a Government agency in its procurement policies has

> The provisions of this section [3648, Revised Statutes] do not necessarily preclude the making of any payment under a contract until the entire subject matter of the contract has been completed and turned over to the Government. Its prime purpose is to prevent the advancement to the contractor of funds with which to enable him to perform his contract. It was not intended to prevent a partial payment in any case in which the amount of such payment had been actually earned by the contractor and the

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followed the practice of making payments and acquired, at most, only a contractual lien, and the propriety of such payments has been questioned, Congress has corrected any legal defect in this practice by special legislation. See 20 Op. A. G. 746 (1894), followed by Joint Resolution 24, May 5, 1894, 28 Stat. 582, 26 Cong. Rec. pp. 3506–7, 4215–4216, 53d Cong., 2d Sess.; 29 Op. A. G. 46, 17 Comp. Dec. 231; 17 Comp. Dec. 894, followed by the Act of August 22, 1911, c. 42, 37 Stat. 32; H. Rep. No. 39, 62d Cong., 1 Sess.; S. Rep. No. 28, 62d Cong., 1st Sess.

> United States had received an equivalent therefor. 18 Op. Atty. Gen., 105; 20 *id.*, 746; 17 Comp. Dec. 894.
>
> In the case here presented the amount of the proposed partial payment in each instance is well within the amount actually expended by the contractor for work and material to go into the performance of the contract. Hence the proposed partial payments are not in excess of the amount actually earned by the contractor. And Article VIII expressly provides that title to all property on which partial payment is made shall vest in the United States forthwith upon the making of such partial payment. Therefore, the condition that the United States must receive a corresponding benefit in order to justify the making of a partial payment is also fulfilled. * * *

These views have been reaffirmed since the passage of the Armed Services Procurement Act of 1947. 28 Comp. Gen. 468, 470 (1949).

Thus, with respect to Section 3648, as amended, upon which appellants rely, we find that for over 60 years not only the chief law officer of the Government but also an officer answerable to Congress itself—and charged specifically with the duty of keeping all Government expenditures within lawful limits[10]—have read nothing in Section 3648 prohibiting the course the Government has followed in this case. On the contrary, this course is the only one which assures that no question can be raised that the payments were in compliance with the requirements of Section 3648, as amended, and were validly made. Compare: 17 Comp. Dec. 894, 899; *United States* v. *Ansonia Brass &c. Co., supra.*

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[10] Budget and Accounting Act, 1921, c. 18, 42 Stat. 20, Sec. 212.

As has been said, the "[c]ourts are slow to disturb the settled administrative construction of a statute long and consistently adhered to." *Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 262; *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501. And this becomes especially true when it must be assumed that Congress was aware of rulings in which the making of partial payments and the taking of title have been approved. 17 Comp. Dec. 231; 29 Op. A. G. 46. Under such circumstances, we think it is untenable to conclude now that Congress intended by Section 3648, as amended, to prohibit the making of partial payments, where the value of the services performed and the property acquired exceed the amount of the payments.[11]

B. THE ARMED SERVICES PROCUREMENT ACT OF 1947 AUTHORIZES THE MAKING OF PARTIAL PAYMENTS

In addition to Section 3648, Revised Statutes, as amended, appellants point to the Armed Services

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[11] In their briefs below, appellants suggested that the amendment of Section 3648 in 1946 avoids the impact of prior administrative construction. It is not clear whether they still adhere to such a suggestion. In view of their statement (Br. 28) that Section 3648 is "relatively new" by recent amendment, we wish to point out that the 1946 amendment made no material change in the statute. The sole purpose of the amendment was to make it easier to enact specific exceptions to the broad prohibition against advance payments. H. Rep. No. 2186, 79th Cong., 2d Sess.; S. Rep. No. 1636, 79th Cong., 2d Sess.; 28 Comp. Gen. 468 (1949).

Procurement Act of 1947 as prohibiting the making of partial payments. Particular emphasis is placed on Section 5 of that Act (Appendix, *infra*, p. 48).

The Armed Services Procurement Act covers procurement by means of advertisement and bids as well as by negotiation. We are here dealing with negotiated contracts. Such contracts may be used, under certain circumstances, after a prescribed procedure has been followed.[12] It is agreed that those procedures were complied with here, and that the negotiation method of contracting in this case was proper. (R. 90.) Once this has been determined, Congress, by Section 4 of the Act, has expressly granted wide discretion to the agency head in determining the type of contract which will promote the best interests of the Government.[13] *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, p. 116. This would include contracts calling for payments from time to time as the work progresses.

Appellants, however, urge (Br. 37-40) that the grant of power contained in Section 4 was intended to be a limited right merely to choose between several pricing arrangements and does not include the authority to make determinations with respect to other matters. To avoid the effect of the decision of this Court in *Kern-Limerick*, they suggest (Br. 41, 44) that a different conclusion might have been reached there if the history of the Act had been more fully presented in the Government's briefs in that case. To support this view they quote (Br. 37–41) certain excerpts taken from the House hearings on H. R. 1366 (which was enacted as the Armed Services Procurement Act of 1947). If it is possible to give the quoted remarks the limited meaning for which appellants contend, the committees themselves did not so understand them. On this precise question it was said (H. Rep. No. 109, 80th Cong. 1st Sess., p. 19; S. Rep. No. 571, 80th Cong. 1st Sess., p. 17):

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[12] Armed Services Procurement Act of 1947, Sec. 2, c. 65, 62 Stat. 21, Appendix, *infra*, p. 47.

[13] *Ibid*, Sec. 4, Appendix, *infra*, p. 47.

> Special provisions other than price provisions may bring about substantial savings of Government funds. Negotiation permits the working out of all terms, not just price, and their harmonization in a way which will be most advantageous to the Government. Special provisions adapted to the circumstances of the particular purchase may be of material importance in securing the best possible agreement for the Government. * * *

Even without the above legislative history, however, we think that the broad wording of Section 4 would carry with it authority to use "partial payments" provisions if, in the opinion of the agency head, they would promote the best interests of the Government. This, it is submitted, would be in keeping with the scheme of the statute which places the authority and responsibility for contract negotiation with the agency head and makes his decisions and determinations final.[14] In the absence of affirmative reasons for a contrary conclusion, we submit that a narrower interpretation is not warranted.

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[14] Armed Services Procurement Act of 1947, Sec. 7 (a), Appendix, *infra*, p. 48.

There is left, then, only appellants' contention (Br. 38) that Section 5 of the Act prohibits the making of partial payments.[15] This section, however, relates not to the making of "partial payments" but to the making of "advance payments." At the time the Act was passed the term "advance payments" had long since become a term of art in the history of procurement laws and regulations, as had the term "partial payments."[16] The two terms are in no sense synonymous. The very nature of the payments is different. In the one case the payment is essentially a loan creating an indebtedness to the Government, while in the other it is a payment by the Government for services performed in its behalf. This distinction is made clear in the Armed Services Procurement Regulation, which provides:[17]

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[15] *Ibid*, Section 5, Appendix, *infra*, p. 48.

[16] See: Joint Resolution No. 24, May 5, 1894, 28 Stat. 582; Act of August 22, 1911, c. 42, 37 Stat. 32; Act of October 6, 1917, c. 79, 40 Stat. 345, Sec. 5, p. 383; Act of June 28, 1940, c. 440, 54 Stat. 676; Act of July 2, 1940, c. 508, 54 Stat. 712.

First War Powers Act, 1941, c. 593, 55 Stat. 838, Sec. 201.

Executive Order 9001 (December 27, 1941), 6 Federal Register 6787.

War Department Procurement Regulations (July 1, 1942), Secs. 81.321, 81.331, 81.347, 81.348, 7 Federal Register 6098, 6105, 6108, 6112, 6113.

War Department Procurement Regulations (August 25, 1945), Secs. 803.321, 803.330, 803.331, 10 Federal Register 10449, 10501–10503, 10507–10508.

Army Procurement Regulations (November 18, 1947), Secs. 804.400–804.407, 805.405, 805.407-2 (a) (b), 12 Federal Register 7692–7693, 7700, 7704–7705.

> 402.501 *Nature of advance payments.* Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. Advance payments are to be distinguished from "partial payments" and "progress payments" and other payments made because of performance or part performance of a contract.[18]

Furthermore, the history of Section 5 itself does not reveal an intent on the part of Congress to restrict the practices already being followed by the Services, either with respect to advance or partial payments.

The Armed Services Procurement Act of 1947 was drafted by persons who had extensive knowledge of, and concern with, the practical problems of Government procurement.[19] The bill which became the law

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[17] Armed Services Procurement Regulations, (November 23, 1950) Sec. 3.501, 15 Federal Register 8038, 32 Code of Federal Regulations (1949 ed.), Sec. 402.501.

[18] The term "partial payments," as used in earlier regulations, has now been changed in the Air Force Regulations to the term "progress payments", no doubt because the latter is more descriptive of the nature of the payments. Department of the Air Force Regulations (August 13, 1953), Secs. 1006.1309, 1006.1310, 18 Federal Register, 4796, 4829, 32 Code of Federal Regulations, Secs. 1006.1309, 1006.1310.

[19] As the House Committee on Armed Services said (H. Rep. No. 109, 80th Cong., 1st Sess., p. 5):

> The bill as introduced is a product of a great many months of intensive thought and effort. There is nothing ill-considered about the measure. It represents the best

was introduced at a time when there were existing War Department Procurement Regulations describing and making provisions for both "advance payments",[20] and "partial payments." The latter provisions required that title to all property acquired for the performance of the contract should forthwith vest in the Government on the making of payments.[21] In fact, while H. R. 1366 was pending before Congress new Army Procurement Regulations were issued.[22] These regulations, anticipating the new procurement procedures, expressly limited themselves to the principles contained in H. R. 1356.[23] Here again, separate provisions were made for "advance payments" as distinguished from "partial payments", and as before, the latter provided for ownership to

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> combined judgment of the officials and procurement experts in both Departments founded upon the unprecedented experience of purchasing almost two hundred billion dollars worth of matériel during the war. As originally introduced, it was thoroughly considered and approved by the Comptroller General. * * *

See also S. Rep. No. 571, 80th Cong., 1st Sess., pp. 24–26.

[20] H. R. 1366, 80th Cong., 1st Sess., 93 Cong. Record, Part 1, p. 640. War Department Procurement Regulations (August 25, 1945), Sec. 803.321, 10 Federal Register 10449, 10501–10503.

[21] War Department Procurement Regulations (August 25, 1945), Secs. 803.330, 803.331, 10 Federal Register 10507–10509.

[22] At the time the bill was introduced the basic authority for procurement was contained in Sec. 1 (a) and (b) of the Act of July 2, 1940, c. 508, 54 Stat. 712; the First War Powers Act, 1941, c. 593, 55 Stat. 838; and Executive Order 9001 (December 27, 1941), 6 Federal Register 6787.

[23] Army Procurement Regulations (November 18, 1947), Sec. 801.100, 12 Federal Register 7670.

vest in the Government.[24] The regulations applied to both Army and Air Force procurement and, in substance, continued in effect procedures formally promulgated at least as early as 1942,[25] and practices followed since 1921.[26] 1 Comp. Gen. 143 (1921).

Placing to one side for the moment all of the historical background of partial and advance payments, the terms of Section 5 themselves afford no basis for an argument that the section was intended to be restrictive of partial payments. It permits the making of advance payments up to the full amount of the contract, leaving the determination of the security to the agency head and only requiring that it be adequate.

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[24] Army Procurement Regulations (November 18, 1947), Secs. 804.400–804.407, 805.405, 805.407-2 (a) (b), 12 Federal Register 7692–7693, 7700, 7704–7705.

[25] War Department Procurement Regulations (July 1, 1942), Secs. 81.321, 81.330, 81.331, 81.347, 81.348, 7 Federal Register 6098, 6105, 6108, 6112, 6113. See also War Department Procurement Regulations (1945), Secs. 803.321, 803.330, 803.331, 10 Federal Register 10449, 10501–10503, 10507–10508.

[26] That the bill (H. R. 1366) contemplated that the existing practice with respect to partial payments would continue is made additionally clear by Colonel Brannon's testimony before a House Armed Services Subcommittee. There he introduced exhibits consisting of extracts from existing procurement regulations and examples of contracts with the statement that they were then in use and it might be anticipated they would continue to be used under the new law. 1 Hearings before House Committee on Armed Services in connection with H. R. 1366, 80th Cong., 1st Sess., p. 580. Each of the contract exhibits contained a section which provided that upon the acceptance of the contract by the contractor, "partial and advance payments, in accordance with regulations from time to time applicable, may be made to you upon your application." War Department Contracts Nos. 7, 8, 9, 10, Secs. 7, Hearings, *id.*, pp. 608–616.

Such terms carry no implication that the section was meant to be restrictive, in any sense. On the contrary, it was put into the statute to remove a restriction resulting from Section 3648, Revised Statutes, as amended, which prohibits the making of advance payments in any case, unless authorized by appropriation or law.[27] It is true that its effect was limited to negotiated contracts; but with respect to those contracts, it made fully effective the broad powers of negotiation which Congress intended to provide in Section 4. *Kern-Limerick, Inc.* v. *Scurlock, supra.* This is not consistent with the thought that Congress intended to give with one hand full rein to certain powers of negotiation in the exceptional case[28] and with the other to take away powers which were utilized in 80 percent of the cases. (R. 86.)

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[27] In this connection, the House Committee on Armed Services said (H. Rep. No. 109, 80th Cong., 1st Sess., p. 33):

> The experience gained by the agencies under emergency legislation permitting the granting of advance payment * * * has shown that a return to the strict principle set forth in section 3648, Revised Statutes * * * wherein advances of public moneys are forbidden in all cases, is undesirable. In many instances the granting of advance payments has enabled the Government to effect substantial savings. This section would permit the granting of advance payments in appropriate situations under provisions for security and repayment much like those employed by the agencies during the war years.

[28] See the testimony of Hon. Kenneth C. Royall, Under Secretary of War, and Hon. W. John Kenney, Acting Secretary of the Navy, respecting the policy of making advance payments. Hearings, *supra*, pp. 460-461. See also War Department Procurement Regulations (1945) Secs. 803.319-1, 10 Federal Register 10449, 10500.

Subsection (b) of Section 5 on which appellants place reliance for the proposition that the taking of title by the United States is prohibited likewise, by its terms, gives no support to their position. The subsection merely furnishes the agency head with an additional tool which he may use if he considers it appropriate.[29]

In summary, appellants are asking this Court to hold that the partial-payment clause is invalid notwithstanding that when the Armed Services Procurement Act was under consideration by Congress, the terms "advance payments" and "partial payments" had been known and distinguished for over sixty years; that regulations providing for "partial payments" with ownership vesting in the Government had been in force for a number of years and the practice of making such payments was of much longer standing; that the bill which became the law represented the combined judgment of the officials and procurement experts of the War and Navy Departments who were thoroughly familiar with the existing regulations; and that the new regulations, anticipating the Act, continued in force the "partial payments" provisions. In the face of these circumstances, neither logic nor law will support an inference that Congress intended to erase, by mere silence, over forty years of practice[30] and well-established regulations. It has long been established that a regulation of a department of the Government, reasonably adapted to the enforcement of an Act of Congress the administration of which is confided to such department, has the force and effect of law if it is not in conflict with express statutory provision. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 349; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501; *United States* v. *Eliason,* 16 Pet. 291, 301, 302.

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[29] Subsection (b) of Section 5 provides that a lien may be taken as security for advance payments upon all credit balances, supplies and materials and, if taken, by the statute it is made a lien paramount to all other liens. The making of such liens paramount is the purpose of the subsection. It avoids, thereby, any question of the priority of the Government's lien. The problem is not a new one. See *United States* v. *Ansonia Brass &c. Co., supra.*

II

THE UNITED STATES ACQUIRED FULL OWNERSHIP OF THE PROPERTY WITH THE RECEIPT BY THE MURRAY CORPORATION OF PARTIAL PAYMENTS

As a second major proposition, appellants assert that their taxes were proper because the property in question was not owned by the United States but by the Murray Corporation. It is urged that the title of the Government was a "paper title" and that the real or beneficial title remained vested in the Murray Corporation, even after its receipt of partial payments.

We do not understand that appellants contend the language used in the subcontracts to transfer ownership to the United States is inept. It is the language which the courts have consistently approved or have themselves used to express such a meaning. *United States* v. *Ansonia Brass &c. Co.,* 218 U. S. 452; *United*

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[30] *United States* v. *Ansonia Brass &c. Co., supra;* 1 Comp. Gen. 143 (1921).

States v. *Allegheny County,* 322 U. S. 174; *In re Read-York, Inc.,* 152 F. 2d 313 (C. A. 7th); *Douglas Aircraft Co.* v. *Byram,* 57 Cal. App. 2d 311; *Craig* v. *Ingalls Shipbuilding Corp.,* 192 Miss. 254; *State ex rel. Superior S. B. Co.* v. *Beckley,* 175 Wis. 272; *In re American Boiler Works,* 220 F. 2d 319 (C. A. 3d). But see *American Motors Corp.* v. *City of Kenosha,* 274 Wis. 315, pending on appeal in this Court, No. 343, this Term. Compare: *United States* v. *Lennox Metal Mfg. Co.,* 225 F. 2d 302 (C. A. 2d). The language is clear and to the point. It provides (R. 175):

> Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production * * *.

This clause should be sufficient to give the Government ownership, since the rights and obligations created by a written contract are to be ascertained from the terms of the document, and its provisions are controlling in the absence of some positive rule of law. *United States* v. *Algoma Lumber Co.,* 305 U. S. 415, 421–422. Furthermore, as we have shown, there is no rule of law preventing the United States from owning the property, and as was said with respect to very similar language: "It would be difficult to state in more precise terms the conditions upon which title to the property vests in the Government." *In re Read-York, supra*, p. 316.

Appellants, however, argue (Br. 53) that the rights granted to the Murray Corporation under the contract, and the treatment of the property by the Government and the Murray Corporation, show that it was intended by the parties that the United States should not receive ownership of the property but merely a lien for security purposes. This being true, they assert that the taxes are proper under the decisions of this Court. *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558. We might say at this point, however, that some of the rights to which appellants refer are coupled with a responsibility towards the Government property, and are not rights flowing from the ownership of the property.

With respect to the treatment of the property by the parties, it is difficult to see, under the circumstances, how a different treatment could have been applied that would have been more clearly in keeping with the knowledge that the property was that of the United States. It was segregated from property owned by the Murray Corporation (R. 97). It was also identified by tags and labels showing the Government contract numbers (R. 97). It was not shown as a part of the Murray Corporation inventory, but instead, the cost was carried on the company books under an account known as "Defense Contracts Receivable—Control" (R. 96). Similar treatment was accorded in the Company's annual report (R. 97).

Before discussing the rights which appellants claim that the Murray Corporation had under the terms of the contract, we wish to quote the opening portion of the clause in which some of the rights referred to are allegedly found. This clause provides, in part (R. 176):

> It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. * * *

This is not language which carries the normal implication that the ownership of the property mentioned is vested in the contractor. It forms a part of the context and bears on the meaning of the language which follows, and on which appellants rely (Br. 61-63) for their claim that the contractor has an unlimited right to acquire or dispose of the property. See also *American Motors Corp.* v. *City of Kenosha*, *supra*. This portion of the clause provides (R. 176):

> The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer. * * *

Here again, we have language which carries no implication that the property which was put into the care, custody, or possession of the contractor may be acquired or disposed of by the Murray Corporation, except to the extent that it meets with the interests and approval of the Government. This view is further supported by the clause which provides that "[t]he agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition) shall * * * be paid or credited to the Government * * *." (R. 176.) The payment of an "agreed price" is customarily made to the owner of the property by the one acquiring it for the price. Without this provision no Contracting Officer could feel authorized to permit the purchase or other disposition of any of the property, no matter how much it might be in the interest of the Government.

An argument is made by appellants (Br. 63–64) that current production scrap could be sold by the contractor without the approval of the Contracting Officer. This provision, however, again gives no support to the proposition that the property or the scrap therefrom belonged to the contractor. Furthermore, it carries no implication that the contractor may sell for scrap what, in fact, is not scrap. To suppose otherwise would be to give to the term "scrap" a meaning of no known content. This is not the case. Scrap is defined in the regulations as property which has no reasonable prospect of sale except for its basic material content. Armed Services Procurement Regulations (February 29, 1952), Sec. 407.221, 17 Federal

Register 1791, 1793. If we assume that the contractor may sell it at any price he chooses, we must also assume that there is no regular established market price for such raw materials. But even with these assumptions, there is nothing to show that the contractor has more than the mere authority to act for and on behalf of the United States in the disposition of a very minor class of property. This right can hardly be indicative of ownership of even the scrap, to say nothing of inferring therefrom that it is indicative of ownership of all the property.

With respect to the assumption of risk proviso (R. 177) to which appellants refer (Br. 58–61), it might well be true as a general rule of law that the risk of loss normally rests with the property owner. But there is nothing which prevents such risk being placed elsewhere by contractual agreement. The risk of loss here falls on the contractor, not because it is the owner but because it accepted that risk as a condition to receiving payments on the contract. There is ample reason for the procurement officers to require the contractor to accept that risk. It is in accord with the decision of the Comptroller General in earlier rulings where Government property was to be left in the possession of a contractor. In those cases, he required that "the contractor shall be responsible absolutely, and not as a mere bailee." 20 Comp. Gen. 917, 919 (1941); see also 28 Comp. Gen. 468, 470 (1949). With the risk of loss of Government property on the Murray Corporation, the fact that the Company insured itself against loss on its own, as well as on property "for which they are liable, all while located in and/or on the premises occupied by the insured" (R. 83), loses the significance which appellants would attach to it (Br. 60).

A further argument is made by appellants that the clause which they state (Br. 64) would cause the Government title to "revest" in the contractor on the liquidation of partial payments or completion of deliveries indicates that the title of the United States was a mere security title, and not ownership.

Without wishing to quibble over appellant's use of words, we point out that the contract provided that if and when the contingencies named should occur "title * * * shall vest in the Contractor". (R. 175–177.) To the extent that words can accomplish that result, the draftsman of the provision has made clear that the title does not "revest" in the sense which appellants would have the Court accept, but that it shall be a new and distinct ownership as though it were acquired for the first time. This view is in keeping with the purposes for which it was included in the regulations as a standard contract clause. It is there explained as a proper amendment to contracts not containing the clause because it is "considered to be of advantage to the Government as simplifying and expediting the transfer and disposition of property acquired for and used in the performance of a contract * * *". War Department Procurement Regulations (August 25, 1945), Sec. 803.331a, 10 Federal Register 10508. One does not transfer and dispose of property which he does not own. We might also add that the observations made in the quoted excerpt from the regulations are equally applicable to the provisions relating to the acquisition of property and the disposition of scrap which are also a part of subsection (d). War Department Procurement Regulations (August 25, 1945), Sec. 803.330, 803.331, 10 Federal Register 10507–10508.

To further support their position on this point, appellants give an example of a hypothetical liquidation of partial payments to show the alleged practical operation of the clause which vests title to the property in the contractor under such circumstances. (Br. 65.) They there assume that the partial payments represent one-quarter of the total contract price, and that goods equal in value to that amount are delivered to the Government. From this they conclude that the partial payments would be liquidated, that all of the remaining inventories, and work-in-process, still in the hands of the Murray Corporation under the subcontract, would be transferred by the subcontract to the company, and that it would then be the owner of property "which might possess a value far in excess of these partial payments." By this means they seek to attack the Government's claim of ownership by suggesting that the normal meaning of the words produce an extreme result which is to be avoided.

It is of course possible for some property to be on hand after the United States has received delivery of finished goods sufficient in value to balance the payments made on the contract. Such property would be owned by the Government, even though it paid nothing for it. If that contingency should occur in any case, the clause referred to by appellants will merely act to correct the situation by transferring ownership from the Government to the contractor. That property of a great value would fall into this class, however, is not probable. The goods delivered represent the same materials and labor on which the partial payments were computed and paid. Since the payments were made at a 90 percent rate, the payments would be liquidated at the same rate. (R. 175.) The difference would be paid to the contractor in cash. From this it is clear that no large amount of property would pass to the contractor, even though the payments and delivered goods became balanced off in the early part of the contract. This latter fact, moreover, would not likely occur; for the use of money is costly, and there is every incentive for the contractor to hold his investment at the minimum by seeking partial payments to the full amount authorzed. Further encouraging the minimization of investment by the contractor is the possibility of termination with the necessarily attendant delay for the contractor in recovering its money. The present case, we submit, is an actual and typical example of how he partial payments provision works. (R 52–53, 83.)

Having had the experience of purchasing almost wo hundred billion dollars worth of equipment, the Government believes it is a safe assumption that when he partial-payment provision was drafted the draftsmen were aware that in the usual case the Government would be paying the major costs of the goods they were buying as fast as they were incurred. If this is true, then the primary concern of the draftsmen could only be to secure for the Government an interest in keeping with its investment and its obligation to pay the retained percentage on delivery. Nothing less than full ownership would meet this test. A clause so drafted, would also clearly satisfy Section 3648, Revised Statutes, as amended, if it requires receiving property at least equivalent in value to the payments made.

Finally, appellants point (Br. 72–75) to Army Regulations which treat partial payments as a method of financing, and to the Manual for Control of Goverment Property as evidencing an intent on the part of the Government that its title to the property in question should be merely a security title.[31]

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[31] Concerning the Manual for Control of Government Property (Br. 74) the fact that property acquired by way of partial payments is expressly excluded does not carry with it an implication that the property is any less the property of the Government. Generally speaking, the Manual applies to property of a capital nature such as manufacturing facilities. It is true that it does include provisions for materials which the Government has purchased directly and turned over to contractors. The control over the latter property, however, may be very limited. Armed Services Procurement Regulations (May 10, 1951) Appendix B, Sections 207.1–207.5, 301, 16 Federal Register 4311, 4324. With respect to fixed-price contracts (which is the only type where the Government's ownership is acquired by means of partial payments), the need for such controls is even less, for the risk of loss is minimal. In the normal case the property would be replaced by the contractor and not the Government. The cost of maintaining controls would not be warranted by the occasional loss which the Government might suffer under unusual circumstances.

So far as the appellants argue that partial payments are a form of financing, we have no reason to disagree. Such payments are a means by which the contractor finances a contract which he, otherwise, would or could not handle. It does not follow, however, as a normal inference, that the Government's title to the property is only a security title. What the Government here has done is not to lend the contractor money. It has paid for services performed on its behalf. In so doing it has made an investment in property, and that investment represents 90 percent of the cost of the materials and the labor used in producing the property. It is true that 100 percent of the price of the articles has not been paid, but what is withheld from the total purchase price in making partial payments is no more than is safely sufficient to assure completion of the contract according to its terms. Most of that, however, will be paid during the progress of the contract as deliveries are made. So far as the property is concerned, it is built to the specifications of the Government and, in some cases no doubt, its details are secret in nature. It is property which the Government needs, and from the standpoint of the Government's interest, should not be the subject of litigation as to who is entitled to it. Ownership of the property itself is the only means whereby the Government can maintain necessary control over defense material in process of production, and the best means whereby the Government's investment may be recovered. Thus, it would seem clear that the Government's interest in the ownership of the property is great. On the other hand, the contractor's investment in the property is relatively small, and in the end the contractor is entitled only to receive the money called for by the contract. To secure that obligation the Government is a better reliance than the property itself. The contractor's concern with the ownership of the property is virtually nil.

Under these circumstances, there is again every reason to suppose that when the Government procurement officers drew the partial-payment clause they intended no less than the words convey, that the Government should have ownership of the property and not a title for security purposes only.

The arguments which appellants here advance are not new. See ***Douglas Aircraft Co.* v. *Byram, supra,*** pp. 315–316. As the state court there pointed out, we are not dealing with the situation where the Government has made a loan with property pledged as security for the performance of the obligation, and with title to be restored when the obligation has been performed. We are not dealing with property which, if all goes well, the contractor expects ultimately to retain for its own use. Here we are dealing with property which the Government has contracted to have manufactured for it into airplane parts. The property was acquired and processed for no other purpose. It is property for which the Government must pay, and to which it will take ownership, whether or not payments are made on the contract price as the work progresses. That the Government, as a result of its experience, chooses to make payments and take ownership of the property in advance of its delivery as a finished product is a matter for the Government to determine, assuming, of course, there are contractors who desire to accept the contract on those terms.

III

PROPERTY OF THE UNITED STATES IS IMMUNE FROM LOCAL TAXATION

The basic doctrine of implied immunity of property of the United States from local taxation [32] is, of course, well settled by the Court's decisions. *United States* v. *Allegheny County,* 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110. The instrumentalities and property of the United States are immune from state taxation or regulation, unless Congress affirmatively provides otherwise (which it has not done here). *Mayo* v. *United States,* 319 U. S. 441, 448.

This immunity does not, as appellants seem to urge (Br. 106, 116, 127–128), come into being only upon a finding that an assessed tax, in fact, constitutes a real interference with the operations of the Federal Government or poses an actual threat to its continued existence. The interest of the United States in its own property is, without more, immune from local taxation, and the tax is not saved from invalidity because the local taxing unit has adopted procedures to assess against, and collect from, those in whose possession the property may be found. A tax may not be imposed upon private persons (here the Murray Corporation) to accomplish the collection of a tax against the United States which could not otherwise be levied. *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643, 645; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151; *United States* v. *Allegheny County*, *supra*; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*.

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[32] The legal issues presented under this point are similar to those discussed by the Government in detail in its brief in *United States of America and Borg-Warner Corporation (Detroit Gear Division)* v. *City of Detroit, a Municipal Corporation,* No. 26, this Term, to which we respectfully refer the Court.

Furthermore, as the cited cases establish, if the tax is in substance a tax on the property of the Federal Government, the tax must fail. Labeling what is clearly an *ad valorem* tax as one *in personam* (Br. 98–106) does not advance the appellant's case. The Court, not being bound either by the form or nomenclature of the tax in determining whether there is an invasion of federal immunity, looks to substance to determine the nature and effect of the levy. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368. The tax here in issue was measured by the value of property in the possession of the Murray Corporation, which property it is claimed was owned by the United States Government (R. 3–11, 56–57).

As this Court has said in the *Allegheny County* case, *supra*, p. 189: "Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee." Also, as this Court has more recently stated in a case involving a bailee of federal property, a tax measured by the worth of federal property would be void. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 499.

Those cases which, despite the claim of implied Governmental immunity, have allowed local taxation of those with whom the Federal Government chooses to deal (*James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Alabama* v. *King & Boozer*, 314 U. S. 1; *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558; *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342; *Esso Standard Oil Co.* v. *Evans*, *supra*) rest upon the conclusion that the tax in question was one based upon the private person's individual gain or advantage, whether obtained by way of receipts, profits, privilege or ownership. But, as this Court has stated in *United States* v. *Allegheny County*, *supra*, p. 186: * * * what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands." Thus, if the assessment or levy is, as we believe is clear in the instant case, a tax upon property of the Federal Government, the tax must fail, even though the local taxing unit has confined itself to proceedings against a private person.[33]

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[33] "* * * [R]enunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed." *United States* v. *Allegheny County*, *supra*, p. 187. See Appellants' Brief, pp. 103–105.

Therefore, the only question open to appellants is whether the Government owned the property upon which the *ad valorem* personal property tax was assessed or levied. As we have already shown, this question must be decided against the appellants.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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October 1957.

APPENDIX

Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21:

> SEC. 2. (a) The provisions of this Act shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.
>
> * * * * *
>
> (c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> (1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;
>
> * * * * *
>
> (10) for supplies or services for which it is impracticable to secure competition;
>
> * * * * *
>
> (41 U. S. C. 1952 ed., Sec. 151.)
>
> SEC. 4. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. * * * (41 U. S. C. 1952 ed., Sec. 153.)
>
> * * * * *

SEC. 5. (a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: *Provided*, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

(41 U. S. C. 1952 ed., Sec. 154.)

SEC. 7. (a) The determinations and decisions provided in this Act to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

* * * * *

(41 U. S. C. 1952 ed., Sec. 156.)

SEC. 9. As used herein—

(a) The term "agency head" shall mean the Secretary, Under Secretary (if any), or any Assistant Secretary of the Army, of the Navy, or of the Air Force; the Commandant, United States Coast Guard, Treasury Department; and the Executive Secretary, National Advisory Committee for Aeronautics, respectively.

* * * * *

(41 U. S. C. 1952 ed., Sec. 158.)

First War Powers Act, 1941, c. 593, 55 Stat. 838:

TITLE II—CONTRACTS

SEC. 201 [as amended by Sec. 1, Act of January 12, 1951, c. 1230, 64 Stat. 1257]. The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the national defense: *Provided*, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to au-

thorize any contracts in violation of existing law relating to limitation of profits: *Provided further,* That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest: *Provided further,* That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.
(50 U. S. C. App. 1952 ed., Sec. 611.)

Act of January 12, 1951, c. 1230, 64 Stat. 1257:

* * * * *

SEC. 2. Title II of such Act, as amended, shall remain in force during the national emergency proclaimed by the President December 16, 1950, or until such earlier time as the Congress by concurrent resolution or the President may designate, but in no event beyond June 30, 1952.

* * * * *

Revised Statutes:

SEC. 3648 [as amended by Sec. 11 of the Act of August 2, 1946, c. 744, 60 Stat. 806]. No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *.
(31 U. S. C. 1952 ed., Sec. 529.)

U. S. GOVERNMENT PRINTING OFFICE 1957

9

Nos.
18
36

INDEX

Page

Jurisdiction 2

No question is Presented Which Gives This Court Jurisdiction of the Appeal 3

Statutes Involved 5

Questions Presented 5

Statement of Case 6

Undisputed Facts 8

Partial Payment Clause Murray-Kaiser Letter subcontract here in question 12

Murray-Wright Partial Payment Provision 16

Summary of Argument 25

Argument:

I. Appellants Cannot Collaterally Attack the Authority for the Validity of the Inclusion of Partial (Progress) Payment-Title Vesting Provisions in Procurement Contracts or Subcontracts for Defense Materials for the United States, to Which Neither of Appellants is a Party 30

II. The United States Contract Procurement Officers Have Authority Under Federal Law to Provide for and Approve the Inclusion of Partial Payment-Title Vesting Clauses in Subcontracts for the Production of Defense Material 34

Page

Under the Armed Services Procurement Act of 1947 the Air Force May Use Any Type of Contract and Include Any Type of Clause Therein—Not Prohibited by Law 34

Partial Payment Clauses Vesting Title in the Government are not Prohibited by the Armed Services Procurement Act of 1947 or by any Other Law 37

They Have a Long Historical Usage in Defense Procurement and are Presently Authorized and Used in 80% of the Air Force Procurement Contracts 37

Contrary to the Contention of Appellants, 31 U.S.C.A. 529 (formerly R.S. 3648) does not prohibit the use of partial payment-title vesting provisions in Air Force Procurement Contracts 43

Only where payments exceed the value of the work performed prior thereto were such payments prohibited. Section 5 of the Armed Services Procurement Act, 41 U.S.C.A. 154, was required only to authorize payments in excess of the value of work performed 46

No such authority was required for partial payments less than the value of work performed prior thereto 47

The Procurement Regulations in force at the time the Murray contracts were entered into authorized standard partial payment clauses 47

The Regulations expressly recognize and point out the difference between partial payments on Account as the work progresses and Advance Payments made in advance of any work or in excess of the value of work theretofore performed ... 49

Page

Contrary to Appellants contention, neither 31 U.S.C.A. 529, as amended, nor any other Act of Congress indicates the necessity of express statutory "direction" for the use of partial payment-title vesting clauses in Procurement Contracts .. 52

Contracting Officers have Authority to use Partial Payment Clauses in Procurement Contracts 56

Contracting Officers May Approve and Authorize the Inclusion of Partial Payment Clauses in Subcontracts 59

III. The title vested in the United States, pursuant to the partial payment-title vesting clause was absolute and complete and not bare legal title or a lien for security 62

Under the Title Vesting Provision of the Partial Payment Clause the Federal Government can maintain Control of Defense Material in Process until Delivery, so Essential to its Government Functioning —which does not Obtain if it Merely has a Lien for Security 68

Government ownership of property acquired by virtue of partial payments upon the purchase price is not denied or affected by regulations as to control of Government property 70

None of the contract provisions in the case at bar or procurement regulations are inconsistent with the vesting of legal and beneficial ownership in the United States Government 72

Risk of Loss and Insurance 72

Page

Authority to acquire or dispose of property "at option of Government" and "upon terms approved by the Contracting Officers" 75

Disposal of Scrap 76

The vesting of Excess or Residual Materials (for which Government does not ultimately pay) After completion of Deliveries or Liquidation of Partial Payments 77

The conduct of Murray and the prime contractors was not inconsistent with the express intention to vest absolute title and ownership in the Government and could not divest the Government of such title 84

IV. The property of the United States, in possession of Murray, was immune from personal property taxes assessed by Appellants 90

The Personal Property Taxes of Apellants are ad valorem taxes *upon the property* of the United States--although collection thereof is sought from Murray 92

The Power to Tax is Predicated Upon Jurisdiction of the Property 95

Even Assuming, Arguendo, that Appellants' Contention that the tax is upon the Owner or Person in Possession and not upon the property—which is erroneous—Since the United States is the Owner, the Tax could not be Assessed upon it or indirectly upon the Person in Possession.. 96

Page

Cases cited by Appellants Do not Support their Contention that the Ad Valorem property tax here in question is a tax on the person 97

Appellants cannot change the nature of the tax from one on the Government's property to a tax on Murray by devising a form of assessment "subject to prior rights of Federal Government" 99

The *Allegheny* case is here controlling. The tax and the incidence thereof is upon the property of the United States which is immune from ad valorem taxation by a State or subdiivision thereof 101

onclusion 166

ppendix 1b

AUTHORITIES CITED

Decisions

Page

Alabama v. King & Boozer, 314 U.S. 1 .... 101, 103

American Boiler Works, In re, 123 Fed. Supp. 352 70

American Boiler Works, In re., 220 F. (2d) 319 ..33, 36, 64, 69, 83

American Motors Corp. v. City of Kenosha, 274 Wis. 315, 80 NW(2d) 363 .... 64, 74

American Smelting Co. v. United States, 259 U.S. 75 ....26, 30, 31

Atkin v. Kansas, 191 U.S. 207 .... 27, 36

Boske v. Comingore, 177 U.S. 459 37

City of Detroit v. Phillip, 313 Mich. 211, 20 NW (2d) 868 ....25, 29, 93, 96

City of Detroit v. Gray, 314 Mich. 516, 22 NW (2d) 771 ....29, 94, 95

Craig, State Tax Collector v. Ingalls Ship Building Corp. 192 Miss. 254, 5 So. (2d) 676..... 28, 64

Crawford v. Koch, 169 Mich. 372, 135 NW 339.... 94, 95

Detroit Shipbuilding Co. v. City of Detroit, 228 Mich. 145, 199 NW 645 97

Detroit Trust Co. v. Detroit, 269 Mich. 81, 256 NW 811............................. 96, 98

Douglas Aircraft Co. v. Byram County Tax Collector, 57 Cal. P. App. (2d) 311, 134 Pac. (2d) 15 .... 29, 64

Dunitz v. Pick Co., 241 Mich. 55, 216 NW 382.... 98

Ellis v. United States, 206 U.S. 246 .... 27, 35

Esso Standard Oil Co. v. Evans, 345 U.S. 495 .... 26, 96, 101, 102, 103

Page

Ever Krisp Food Products Co., In re., 307 Mich. 182, 11 NW (2d) 852 .... 94, 95

Federal Reserve Bank v. Dept. of Revenue, 339 Mich. 587, 64 NW (2d) 639 102

Federal Trade Comm. v. Raymond Co., 263 U.S. 565 36

Friend v. Lee, 221 F (2d) 96 .... 26, 32, 33

Graves v. New York, 306 U.S. 466 .... 101, 103

Heim v. McCall, 239 U.S. 175 .... 27, 36

Helvering v. Mountain Products Corp., 303 U.S. 376 .... 101, 103

Hines Lumber Co., 196 Or. 420, 248 Pac. (2d) 720. 68, 100

James v. Dravo Contracting Co., 302 U.S. 134 ... 101, 102, 103

Kern-Limerick, Inc. and United States v. Scurlock, Commr. Rev. of Arkansas, 347 U.S. 110 .... 4, 25, 27, 29, 35, 40, 49, 52, 63, 64, 74, 90, 92, 103, 104

Lucking v. Ballentine, 132 Mich. 584, 94 NW 8 ... 98

Maryland Casualty Co. v. United States, 251 U.S. 342 37

Muschany v. United States, 324 U.S. 49 35

National Bank of Detroit v. City of Detroit, 272 Mich. 610, 262 NW 422 90

Neilson v. Lagow, 12 How. (U.S.) 98 36

New Brunswick v. United States, 276 U.S. 547 ... 100

Offutt Housing Co. v. Sarpy, 351 U.S. 252 .... 88, 89, 90

Okla. Tax Comm. v. Texas Co., 336 U.S. 342 101

Perkins v. Lukens Steel Co., 239 U.S. 88 .... 26, 31, 32

Pingree v. Auditor General, 120 Mich. 95, 78 NW 1025 .... 25, 29, 92, 94

Page

Read York, In re., 152 F (2d) 313 ....28, 64, 69

Robertson v. Labor Board, 268 U.S. 613 58

Smith Company v. Fitzgerald, 270 Mich. 659, 259 NW 352............................ 92

S.R.A. v. Minnesota, 327 U.S. 558 ....29, 68, 74, 100

Society for Savings in the City of Cleveland v. Tax Commr. of Ohio, 349 U.S. 143 .... 74, 92

Superior Shipbuilding Co. v. Beckley, 175 Wis. 337, 185 NW 199 ....28, 64, 74, 75

Taylor v. County of Genesee, 286 Mich. 674........ 90

Thompson v. Union Pacific R.R. Co., 76 U.S. 579.. 104

Union Pacific R.R. Co. v. Peniston, 85 U.S. 5..... 104

United States v. Allegheny County, 322 U.S. 174.. 4, 25, 29, 64, 74, 84, 88, 90, 91, 92, 95, 97, 99, 100, 101, 102, 103, 104-108

United States v. Ansonia Brass & Copper Co., 218 U.S. 452 ....28, 29, 38, 64, 65, 67, 70, 74, 79, 83, 88, 104-5

United States v. Hodson, 10 Wall (U.S.) 395 36

United States v. Lennox Metal Mfg. Co., 225 F (2d) 302 ....64, 82, 83

United States v. Linn, 15 Pet. (U.S.) 290 ....27, 35, 36, 52

Page

United States v. Morehead, 243 U.S. 607 37

United States v. N.Y. & Puerto Rico S.S. Co., 239 U.S. 88 31

United States v. Tingey, 5 Pet. (U.S.) 115 36

Van Brocklin v. Tennessee, 117 U.S. 151 ....25, 27, 36, 52

West Michigan Lumber Co. v. James Dean, 73 Mich. 459, 41 NW 503........ 98

Wright Aeronautical Corp v. Glander, 151 Ohio 29, 84 NE. (2d) 483 .... 28, 64

STATUTES AND LEGISLATIVE HISTORY

Armed Services Procurement Act of 1947—
(41 U.S.C.A., Sec. 151, et seq.)

Sec. 151, et seq. 5, 27, 34, 37, 38

Sec. 153 ....34, 36, 38, 106

Sec. 154 ....46, 47, 49, 50, 55, 57

Sec. 156 ....37, 46, 57

Senate Report No. 571 40

2 U.S. Code, Congressional Service, 80th Congress Second Session, 1948, pages 1064, 1065, 1075, 1077 .... 39, 40

House Armed Services Committee Hearings, Vol. 38. Library of Congress, page 576 41

Subcommittee Hearings, H.R. 1366, Document No. 51, dated February 4, 1947 42, 43

U.S.C.A. 22 37

	Page
12 U.S.C.A. 1748	88
28 U.S.C.A. 1254 (2)	2, 4
31 U.S.C.A. 529	43-47, 51 53, 54, 55 56
House Report 2186, 79th Congress, Second Session	44
Senate Report 1636, 79th Congress, Second Session	44
Report of Hearing on H.R. 4586, Committee on Expenditures in the Executive Department, House of Rep., February 13, 1946, 79th Congress, Second Session	44
34 U.S.C.A. 582	53, 54
Report No. 39, 62nd Congress, First Session, House of Rep., May 26, 1911	53
40 Stat. 383, Act of October 6, 1917	53
50 U.S.C.A. 1151	54
50 U.S.C.A. 611	54, 55
Senate Report 911, 77th Congress, First Session	55
House Report 1507, 77th Congress, First Session	55
41 U.S.C.A. 255	56
40 U.S.C.A. 472 (k)	61
Hearing before the Committee on Gov't. Operations, U.S. Senate, 84th Congress, 1st Session, Part I, Appendix II	108
Report of the Interdepartmental Committee for the Study of Jurisdiction in Federal Areas within the State	108

Page

Charter of the City of Detroit
Title VI, Chap. II, Sec. 1 .... 5, 25, 92, 95
Title VI, Chap. IV, Sec. 1 .... 5, 92
Title VI, Chap. IV, Sec. 7 .... 5, 96
Title VI, Chap. IV, Sec. 26 5
Title VI, Chap. IV, Sec. 27 5

Compiled Laws of Michigan, 1948
(Michigan General Property Tax Law—6 Mich. Stat. Anno., Sec. 7.1-7.243)
Sec. 211.1 (M.S.A. 7.1) 5, 25, 93, 95
Sec. 211.10 (M.S.A. 7.11) 5, 93
Sec. 211.40 (M.S.A. 7.81) 5, 99
Sec. 211.53 (M.S.A. 7.97) 24
Sec. 211.13 (M.S.A. 7.13) 96
Sec. 211.14 (M.S.A. 7.14) 96
Sec. 211.24 (M.S.A. 7.24) 96, 97

Compiled Laws of Michigan, 1948,
Sec. 117.3 (Mich. Stat. Anno., Sec. 5.2073) ... 5, 93

Constitution of the State of Michigan (1908),
Article X, Sec. 3 (Compiled Laws of Michigan, 1948, Vol. 1) 92

REGULATIONS

0 Code of Federal Regulations, 1945 Supp., Pars. 803-330, 803-331 and 803-331(a) 42, 78

2 Code of Federal Regulations, 1949 Ed. (1950 Pocket Supp.) Part 400-428 .... 5, 47

0 Code of Federal Regulations, 1947 Supp. Chap. VIII, 801-100 (12 Fed. Register, page 7670) . 48
Sec. 805.407-2 (A.P.R. 5-407 (2)) (12 Fed. Register, p. 7704), re partial payments 5, 11, 17, 48

	Page
32 Code of Federal Regulations, 1949 Ed. (1950 Pocket Supp.)	
Sec. 402.500-402.505 re advance payments	49-51
Sec. 1000.101	50
Sec. 1002.501-1002.505 re partial payments vs. advance payments	50, 51
Sec. 100.402	57
Sec. 1000.400	57
Sec. 400.102	47, 48
Sec. 400.103	47
Air Materiel Command, Directorate Office Instruction No. 70-83	18, 19, 60

OPINIONS, ADMINISTRATIVE RULINGS AND OTHER REFERENCES

18 Opinions of Attorney General (U.S.) 105	63
20 Opinions of Attorney General (U.S.) 746	28, 38, 44
1 Comp. General Opinions 143	44
29 Opinions of Attorney General (U.S.) 46, 48	28, 45, 53
4 Contract Cases (C.C.H.) Sec. 60.655—Comptroller General Dec. No. B83260	28, 38, 45
4 Contract Cases (C.C.H.) Sec. 60.016—Opinion of Judge Advocate General, SPJGC, 1945	28, 45
Williston on Contracts, Rev. Ed., Vol. 2, Sec. 347	59
Williston on Sales, Rev. Ed., Sec. 302 and 421	72, 87
Opinions of Attorney General—Michigan	
January 17, 1936	90
May 28, 1941	90
1 C.C.H. Gov't. Contracts Rep., Para. 10, 411	67
1A C.C.H. Gov't. Contracts Rep., Para. 29, 754	70, 71
1A C.C.H. Gov't. Contracts Rep., Para. 29, 757	71
1A C.C.H. Gov't. Contracts Rep., Para. 26, 714.9	82
29 Am. Jur., p. 296, Sec. 325	74
29 Am. Jur., p. 294, Sec. 322	74
Cooley on Taxation, 4th Ed., Vol 1, Sec. 24	98

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Appellee, and
THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 36

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Respondent, and
THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief
of
Appellee and Respondent

JURISDICTION

Consideration of jurisdiction of appellants' appeal in Case No. 18 (No. 401, October Term 1956) was postponed by the Court until the hearing on the merits (R. 284). At the same time an order allowing certiorari was granted in Case No. 36 (No. 563, October Term 1956) (R. 284), thus affording review to appellants, as petitioners in the certiorari proceeding, of the questions raised on the merits of the appeal.

However, since the Court indicated that the question of jurisdiction was to be considered, it should be pointed out that—

No Question is Presented Which Gives this Court Jurisdiction of the Appeal

Appellants predicate jurisdiction of this appeal upon Section 1254 (2) of Title 28, U.S.C.A., which provides that this Court may review a judgment of the Court of Appeals

> "By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ."

The Court of Appeals did not decide that the Michigan General Property Tax Law or the Charter of the City of Detroit, pursuant to which the taxes in question were assessed, were "invalid as repugant to the Constitution, treaties or laws of the United States," but held that under the partial payments clause in question the United States was vested with absolute title to the property in question and accordingly Murray had no interest in the property which could be subject to taxation. The validity of the ad valorem tax laws of the State of Michigan and of the City of Detroit have never been questioned in this litigation. The only real question has been whether absolute title (not merely a security title) was vested in the United States or in Murray.

Appellants have never contended that property of the United States may be subjected to state ad valorem property taxes and the Michigan statute has never been construed as permitting the taxation of Federally owned property. Indeed, in his argument before the District Court counsel for the City of Detroit stated:

> "And I might say that it is not the position of the City that it has the right to tax the property of the United States Government. But we contend that we did not do that in this case."[1]

In their joint Reply Brief in the Court of Appeals appellants further stated that—

> "Neither the County nor the City has contended that these levies were specific taxes or that they were not **ad valorem** property taxes."

The District Court noted that—

> "There is no disagreement on the proposition that local government may not tax property owned by the Federal Government. Whether the personal property here as-

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[1] Transcript of proceedings before Honorable Thomas P. Thornton, District Judge, March 11, 1954; page 76, on file as part of the record herein, but not printed.

sessed was owned by the Federal Government in the sense that it could not be taxed at a local level is the issue." 132 F. Supp. 899-904 (R. 119).

Admittedly the state and local taxing statutes imposing an ad valorem tax on property are valid. If title to the property was vested in the United States on tax assessment day, the property was constitutionally immune from such taxation. If title was not vested in the United States, there was no immunity.

The Court of Appeals merely applied Federal law to determine whether title to property produced for the sole ownership and use of the United States, in connection with the national defense, was in fact vested in the United States. *United States v. Allegheny County* 322 U.S. 174, 182 (1944), *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). Having so determined, the doctrine of Federal constitutional immunity undisputably obtains.

The authorities cited by Appellants in support of this appeal (pages 3-7 of Appellants' Brief) merely reaffirm the rule that an appeal will lie only where a state statute is held invalid as repugnant to the Federal Constitution and do not support Appellants' position here.

No question of the invalidity of a state statute as being repugnant to the Constitution, laws or treaties of the United States is here presented. We respectfully submit that this Court does not have jurisdiction of the appeal under 28 U.S.C. Section 1254 (2) and that the appeal should be dismissed.

STATUTES INVOLVED

While appellants[2] have cited a number of statutes as being “connected with the issues” presented by this case (pp. 7-8 of Appellants' Brief), only the following statutes, regulaions and ordinances are directly involved and have any deerminative effect with relation to the issues here presented.

Armed Services Procurement Act of 1947, Public Law 413 of 80th Congress, C. 65, 62 Stat. 21 et seq., as amended, 41 U.S.C.A., Sec. 151 et seq.

32 Code of Federal Regulations, 1949 Ed. (1950 Pocket Supp.) Part 400-428 (14 Fed. Register, p. 523).

Sec. 805.407-2 (A.P.R. 5-407(2)), (12 Fed. Register, p. 7693).

Compiled Laws of Michigan, 1948, Sections 211.1, 211.10 and 211.40 (Mich. Stat. Anno., Sections 7.1, 7.10 and 7.81).

Compiled Laws of Michigan, 1948, Section 117.3 (Mich. Stat. Anno., Section 5.2073).

Charter of the City of Detroit
- Title VI, Chap. II, Sec. 1.
- Title VI, Chap. IV, Sec. 1.
- Title VI, Chap. IV, Sec. 7.
- Title VI, Chap. IV, Sec. 26.
- Title VI, Chap. IV, Sec. 27.

The provisions of the above cited statutes, regulations and ordinances are lengthy and accordingly their pertinent text is set forth in the Appendix attached hereto.

QUESTIONS PRESENTED

The questions presented for review are—

1. May appellants collaterally attack the authority for and validity of the inclusion of partial (progress) payment-title vesting provisions in procurement contracts or subcontracts, for defense materials for the

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[2] As hereinbefore stated, we do not believe that the issues here involved are properly reviewable by appeal, but since the City of Detroit and County of Wayne in their brief refer to themselves as “appellants,” rather than “petitioners,” and to Murray as “appellee,” rather than “respondent,” for purposes of clarity only, we will use the designation of “appellant” and “appellee” herein.

United States, to which neither of appellants is a party?

2. Did the United States contract procurement officers have authority under Federal law to provide for and approve the inclusion of partial payment-title vesting clauses, in subcontracts for the production of defense material?

3. Was the title vested in the United States, pursuant to the partial payment-title vesting clause absolute and complete and not bare legal title or a lien for security?

4. Is property owned by the United States (otherwise immune from local taxation) subject to state and local **ad valorem** personal property taxation merely because the property is in possession of a private contractor and the tax is billed to the contractor and not directly to the United States?

STATEMENT OF CASE

Appellants' Statement of Case (pp. 9-21 of Appellants' Brief) is insufficient and does not present all of the cogent facts material to the issues before the Court. Accordingly, so that all of the facts pertinent to the issues before the District Court and the Court of Appeals are properly before this Court, Appellee submits the following Statement of Case. In the interest of intelligibility and continuity it is necessary to repeat some of the facts set forth in Appellants' Brief.

This is a consolidated action originally brought by plaintiff-appellee, The Murray Corporation of America (hereinafter referred to as "Murray"), for a refund of personal property **ad valorem** taxes assessed by defendants-appellants, City of Detroit and County of Wayne as of January 1, 1952 upon personal property of the United States then in the possession of Murray under two letter subcontracts, under letter prime contracts between Kaiser Manufacturing Company and the United States and Curtiss-Wright Corporation and the United States, respectively, for the manufacture of parts and components for aircraft and aircraft engines for the United States Air Force for defense purposes.

Title to such personal property was vested in the United
ates on and prior to the assessment date by virtue of pro-
sions of partial payment-title vesting clauses, incorporated
the letter subcontracts, hereinafter set forth, pages 12-15;
-17.

The partial payment-title vesting clause in question is
standard and widely used clause in procurement contracts
r defense work for the United States Government, which
ause is permitted by Federal law and is provided for under
pplicable procurement regulations.

epresentatives of the United States Air Force state that—

> "partial payment clauses with provisions vesting the title in the United States have been included in upwards of 80% of fixed price prime and subcontracts for the production of aircraft for the United States, by contract, and in substantially a greater percentage of contracts, dollarwise."

Stipulation No. 2, Paragraph (2)), (R. 86).

Partial payments were made to Murray under each of the
forementioned letter subcontracts prior to January 1, 1952,
he assessment date, and thereupon title vested in the United
tates and remained vested in the United States on and after
ich date. Throughout, Murray contended that the property
as owned by the United States and was immune from local
d valorem taxation and that the assessment and taxation of
ich property to Murray was illegal and void. After exhaust-
ng all administrative review Murray paid the taxes in ques-
ion involuntarily and under written protest.

The cause was submitted to the District Court upon plain-
iff-appellee's Motion for Summary Judgment and at the
earing of March 11, 1954—

> "it was **agreed** among the parties that **there was no genuine issue of any material fact,** and that a summary **judgment in favor of the plaintiff, or in favor of the defendants would be in order."**

See opinion of District Court, 132 Fed. Supp. 899, 900 (R. 112).

The tax here in question is an **ad valorem property tax** assessed pursuant to the Michigan General Property Tax Law and the Charter of the City of Detroit.

The City of Detroit personal property taxes here involved were assessed pursuant to Title VI, Chapter II, Section 1 of the Charter of the City of Detroit which provides:

> "Section 1. **All** real and **personal property** within the city **subject to taxation by the laws of this state shall be assessed** at its true cash value by the board of assessors herein provided . . . **All taxes upon personal property** may be assessed in any district, **whether** the **person** assessed is **a resident of such district or not."**

Both the City of Detroit and County of Wayne personal property tax assessments are made subject to the authority of the General Property Tax Act of Michigan, Act 206 of the Public Acts of Michigan, 1893, as amended (Mich. Stat. Anno. Sec. 7.1-7.243).

UNDISPUTED FACTS

(1) The assessment of $2,043,670[3] here in dispute was

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[3] This consolidated action involves the recovery of $67,714.9 from the City of Detroit and $12,572.66 from the County o Wayne, exclusive of interest (R. 124-6). However, a number o similar cases, involving many millions of dollars, wherein stat and local tax authorities are seeking to impose ad valorem prop erty taxes upon defense material belonging to the United State under partial payment—title vesting clauses in the possession o appellee and other defense contractors, are presently pending i Michigan and in other jurisdictions.

As of April 30, 1957, it is estimated by the Air Materiel Com mand that the value of raw materials, work in process, part nondurable tools and inventories on which progress paymen were made by Air Force totalled $2,846,704,000.

against property acquired or produced by appellee, Murray, under two letter subcontracts (a) one with Kaiser-Frazer Corporation (said corporation and its assignee, Kaiser Manufacturing Corporation, hereinafter referred to as "Kaiser") and (b) the other with Wright Aeronautical Corporation, now Curtiss-Wright Corporation (hereinafter referred to as "Wright"), each under and pursuant to letter prime contracts between the United States Government and Kaiser and Wright, respectively. (Stipulation No. 4, (10)) (R. 98).

(2) On December 20, 1950, Kaiser-Frazer Corporation entered into a letter prime contract, No. AF 33(038)-18481, with the United States Government for the manufacture of certain airplanes and airplane parts, tools and subassemblies for the use and benefit of the United States Air Force in furtherance of the national defense effort. This letter prime contract was thereafter assigned, with the consent of the Government, on June 18, 1951, to Kaiser Manufacturing Corporation, a wholly-owned subsidiary of Kaiser-Frazer Corporation. This letter prime contract and all amendments thereto (hereinafter referred to as the "Kaiser letter prime contract") in effect on January 1, 1952, the assessment date, are set forth as Exhibit 1 (R. 140-168) in the volume of appellee's exhibits referred to in the affidavit of Mark I. Sammon (R. 39-59), except for amendment No. 5, thereto, which is attached to the affidavit of M. H. Dreety (R. 91-93). A superseding definitive prime contract with Kaiser was not agreed upon in final definitive form nor made effective until May 16, 1952, after the assessment date (January 1, 1952) here in question (Stipulation No. 2 (9) (b)) (R. 89).

(3) (a) On March 23, 1951, Murray having been advised by Kaiser that Kaiser was a prime contractor of the United States Government to manufacture certain types of aircraft for the United States Air Force under said letter Prime Contract No. AF 33(038)-18481 (R. 140-168), entered into a

letter subcontract with Kaiser (R. 168-172) for the manufacture of certain parts and subassemblies, therein specified, which were required under said prime contract by and for the United States Air Force as a part of the current National Defense effort.

The aforesaid letter subcontract was amended by mutual agreement on August 15, 1951 (Exhibit 2B) (R. 173) and again on October 4, 1951 (Exhibit 2C) (R. 181).

(b) Murray expressly agreed in said letter subcontract with Kaiser (Exhibit 2A) (R. 169):

> "* * * to enter into a subcontract with you (Kaiser) **under** your **(Kaiser's)** Letter **Contract** AF 33(038)-18481 **with the United States Governmeat** as amended by amendments Nos. 1 and 2 (copies of which have been submitted to us (Murray), covering your (Kaiser's) proposal * * *" (emphasis supplied)

and accordingly undertook to perform a portion of the work called for by the aforementioned Kaiser letter prime contract, and the Murray-Kaiser letter subcontract became a subcontract under said Kaiser letter prime contract with the United States Government.

(c) Said Kaiser letter prime contract (Exhibit 1, paragraph 5) (R. 145) expressly provided that—

> "Pending the execution of a definitive contract, each expenditure, order, **subcontract** or commitment made by you (Kaiser) in furtherance of your (Kaiser's) performance hereunder, if for an amount that shall exceed either five per centum of the amount last above stated or $25,600.00, whichever is less, for tools, dies, jigs, fixtures, materials, supplies, parts, equipment, engineering assistance of reproduction or other license rights **will be subject to written approval by the Contracting Officer. No contract,** regardless of the amount thereof, **shall be made by you** (Kaiser) with any other party for furnishing any

of the completed or substantially completed articles, spare parts or work herein called for, **without the written approval of the Contracting Officer** as to sources." (Emphasis furnished)

Both the aforesaid Murray-Kaiser letter subcontract and the amendments thereto were duly approved in writing on the signature pages thereof by a Contracting Officer of the United States Air Force as representative of the United States Government under and as required by the aforesaid letter Prime Contract AF 33(038)18481 (Exhibit 1, Paragraph 5) (R. 145).

(d) Said letter subcontract, in the form of Exhibits 2A, B, C (R. 168-181), was in full force and effect on, prior and subsequent to January 1, 1952, the tax assessment date here in question (Stipulation 4, par. (1)) (R. 94). Under Paragraph 4 of the original Murray-Kaiser letter subcontract of March 23, 1951, (Exhibit 2A) (R. 170), provision was made for partial (or progress) payments to Murray as its work thereunder progressed, as follows:

> "It is understood that your (Kaiser's) Letter Contract with the Government (and the definitive contract to be executed pursuant thereto) will be amended so that there may be included in the Subcontract, and accordingly the subcontract will provide for, partial payments in substantially the same manner as provided in APR 5-407.2(1)[1] except that payments shall be 90% of cost instead of 75%.
>
> "We agree to furnish to you such information and to allow you to conduct such audits as may be required by

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[1] Code of Federal Regulations, 1947 Supp., Title 10, Chapter VIII, 805.407-2; 12 Fed. Register page 7670 (R. 183). See Appendix B hereto.

The partial payment clause in the Murray-Kaiser subcontract, quoted on the next pages hereof, follows the language of the clause prescribed by the regulation.

the Government under the provisions of said Article in respect of requests for partial payments. You agree subject to the provisions of such Article to make partial payments to us. It is further understood that as soon as your Letter Contract is so amended, requests for partial payments may be made by us in respect of costs incurred by us hereunder."

Kaiser's letter Prime Contract was accordingly amended by Amendment 4 (Exhibit 1) (R. 161), and thereupon Paragraph 11 was added to said original Murray-Kaiser letter subcontract by amendment dated August 15, 1951 (Exhibit 2-B) (R. 174), as follows:

Partial Payment Clause
Murray-Kaiser letter subcontract here in Question

"11. **Partial payments—Partial payments,** which are hereby defined as payments prior to delivery, **on work in progress for the Government** under this contract, may be made upon the following terms and conditions:

"(a) The **Contracting Officer may,** from time to time **authorize partial payments to The Murray Corporation of America** (hereinafter called "the contractor") upon property acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated partial payments, if any, made under this contract, exceed 80 percent of the contract price of supplies still to be delivered.

"(b) **Upon the making of any partial payment** under this contract, **title** to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, **shall forthwith vest in the Government;** and **title** to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid **shall vest in the Government forthwith** upon said acquisition or production: Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor, Kaiser-Frazer Corporation, or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

'(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

'(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provision.'"

(4) On December 12, 1950, Wright Aeronautical Corpora-
n entered into a similar letter prime contract, No. AF
(038)-18132, with the United States Government for the
anufacture of certain airplane engines and engine parts
d subassemblies for the ultimate use and benefit of the
nited States Air Force, in furtherance of the national de-
nse effort. Wright Aeronautical Corporation was later
erged into Curtiss-Wright Corporation, and Curtiss-Wright
as substituted for Wright Aeronautical Corporation in the
tter prime contract with the United States Government on
ctober 31, 1951 (R. 211). This letter prime contract and all
mendments thereto (hereinafter referred to as the "Wright
tter prime contract") in effect on January 1, 1952, the
sessment date, are set forth as Exhibit 4 (R. 189).

(5) (a) On April 19, 1951, Murray, having been advised
the Wright Aeronautical Corporation, now the Curtiss-
right Corporation (hereinafter jointly or severally referred
as "Wright") that Wright was a prime contractor of the
nited States Government to manufacture certain types of
rcraft engines for the United States Air Force under prime
ntract No. AF 33(038)-18132 (Exhibit 4) (R. 189), en-
red into a letter subcontract with Wright (R. 216) for the
anufacture of certain engine parts and subassemblies,
erein specified, which were required under said Prime Con-
act by and for the United States Air Force as a part of the
rrent National Defense effort.

The aforesaid letter subcontract was amended by mutual
greement on May 24, 1951 (R. 222).

(b) Murray expressly agreed in said letter subcontract
ith Wright (Exhibit 5A) (R. 216):

> " . . . to enter into a subcontract with you **under** your **(Wright's) contract** AF 33(038)-18132 **with the United**

> **States Government** pursuant to which subcontract we would manufacture and sell to you (Wright) the following subassemblies . . . "

and accordingly undertook to perform a portion of the work called for by the above Wright letter prime contract, and the Murray-Wright letter subcontract became a subcontract under said Wright letter prime contract with the United States Government.

(c) Both the aforesaid letter subcontract and the amendment thereto were duly approved in writing on the signature page thereof by a Contracting Officer of the United States Air Force, as representative of the United States Government as required by the aforesaid Wright letter prime contract No. AF 33(038)-18132 (Exhibit 4) (R. 192) in effect between the United States Government and Wright on January 1, 1952.

(d) Said Murray-Wright letter subcontract, in the form of Exhibit 5-A, B (R. 216-223) was in full force and effect on, prior and subsequent to January 1, 1952, the tax assessment date here in question (Stipulation 4, par. (2) (R. 94). Paragraph 5 of said letter subcontract (Ex. 5-A) (R. 219-220) provided for the making of partial (or progress) payments to Murray as the work covered by the subcontract progressed, as follows:

Murray-Wright Partial Payment Provision

> "It is understood that your contract with the Government will be amended forthwith so that there may be included in the subcontract, and accordingly the subcontract will provide for, partial payments of 75% of cost in substantially the same manner as provided in ASPR5-

> 407.2(1).[5] We agree to furnish to you such information and to allow you to conduct such audits as may be required by the Government under the provisions of said Article in respect of requests for partial payments. You agree subject to the provisions of such Article to make partial payments to us. It is further understood that as soon as your contract is so amended, requests for partial payments may be made by us in respect of costs incurred by us hereunder."

Murray was advised in the regular course of business that Prime Contract AF 33(038)-18132 (Exhibit 4) was amended on May 18, 1951 (See Exhibit 4, Amendment 4, par. 2-f) (R. 208), as agreed in the provision of said subcontract above quoted and the provision for partial payments to Murray by Wright thereupon became effective. (Affidavit of Mark I. Sammon (R. 47)).

(6) On August 10, 1951, September 21, 1951, October 24, 1951, December 10, 1951 and December 20, 1951, Murray forwarded formal written requests to Kaiser for partial (or progress) payments upon the sale price in the amounts of $23,203.13, $95,924.46, $44,821.61, $301,239.90 and $267,971.19, respectively (Exhibit 7) (R. 236-250), under and sub-

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[5] The reference to ASPR5-407.2(1) was inadvertent. There was not then nor has there ever been an ASPR5-407.2(1), but said reference was intended by Murray, Wright and the United States Government to incorporate the partial payment provisions of APR5-407.2(1) (R. 183),—just as was done in the Murray subcontract with Kaiser (Paragraph 1, supra, Exhibit 2-A, Paragraph 4) (R. 170). All partial payments requested by Murray of Wright and paid by Wright to Murray after April 19, 1951, the date of the aforesaid letter contract (Exhibit 5-A, B), were made in accordance with APR5-407.2(1). APR5-407.2(1) appears in the Code of Federal Regulations, 1947 Supp., Title 10, Chapter VIII, Par. 805.407-2 (R. 183), which is in substantially the same form as the clause quoted in Paragraph 4 (d) hereof, which is Paragraph 1i of Murray's letter subcontract with Kaiser (Exhibit 2-B) (See affidavit of Mark I. Sammon (R.47)).

ject to the provisions in its letter subcontract with Kaiser, hereinabove quoted (Paragraph (3) (d) hereof, supra, Exhibit 2-B, Paragraph 11) (R. 174).

Said requests for partial payments were made upon Form DOI 70-83 of the United States Air Force and pursuant to office instructions issued by Headquarters, Air Materiel Command, Wright-Patterson Air Force Base at Dayton, Ohio, which office instructions were delivered to Murray by the Contracting Officer of the United States Air Force who represented the United States Government in checking, approving and processing such invoices for partial (or progress) payments under Murray's aforesaid subcontracts with Kaiser and Wright (Exhibits 2-A, B, C (R. 169-183) and Exhibits 5-A, B (216-223)). Exhibit 6 (R. 224-236) consists of a copy of the aforesaid office instructions with Form DOI 70-83 attached, dated June 16, 1951.

The requests were duly audited by the United States Air Force Audit Staff for the Detroit area and approved in writing by a Contracting Officer of the United States Air Force representing the United States Government. Each such request bears upon its face the following endorsement duly signed and executed by a Contracting Officer of the United States Air Force.[9]

> "Under the provisions of the contract, I hereby authorize and approve a partial payment in the amount of $...................." (R. 244).

The aforesaid audits and approvals of Murray's requests for partial (or progress) payments were pursuant to the requirements of the Air Force's Prime Contract with Kaiser (Exhibit 1, par 2-b of Amendment No. 4 (R. 161-162). Exhibit 7 (R. 236-250) consists of copies of the aforesaid requests of Murray for partial (or progress) payments, bearing the Air Force Contracting Officer's approvals.

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[9] The requests of August 10, 1951 and September 21, 1951 were so approved by letters dated 20 September 1951 (R. 239) and 19 October 1951 (R. 242), respectively (Exhibit 7).

(All of the statements in 6 hereof appear in
Sammon's affidavit, par. 3, (R. 47-49))

(7) On October 30, 1951, and December 4, 1951, Murray forwarded formal written requests to Wright for partial (or progress) payments upon the sale price in the amounts of $271,420.38 and $139,407.29, respectively (Exhibit 8) (R. 251-255) under and subject to the provision in its letter subcontract with Wright, hereinabove quoted (par. 5(d) hereof, supra, Exhibit 5-A par. 5) (R. 219).

Said requests for partial payments were made upon Form DOI 70-83 of the United States Air Force and were duly audited by the United States Air Force Audit Staff for the Detroit area and approved in writing by a Contracting Officer of the United States Air Force, representing the United States Government, in the same manner as the Murray partial payment requests on Kaiser described in (6) hereinabove.

The aforesaid audits and approvals of Murray's requests for partial (or progress) payments were pursuant to the requirements of the Air Force's Prime Contract with Wright (Exhibit 4, Paragraph (f) of Amendment No. 4 (R. 208)). Exhibit 8 (R. 251-255) consists of copies of the aforesaid requests of Murray for partial (or progress) payments bearing the Air Force Contracting Officer's approvals.

(All of the statements in 9 hereof appear in affidavit
of Mark I. Sammon, par. 4, (R. 49-50)).

(8) Pursuant to the aforesaid requests made by Murray to Kaiser, Murray received partial (or progress) payments in the aggregate amount of $163,949.20 on October 12, 1951.

Exhibit 10 (R. 258-259) consists of copies of the three Remittance Advices covering such payments kept by Murray, with the check number and date of receipt duly inscribed thereon in the regular course of business pursuant to Murray's regular, usual and ordinary system of record keeping and accounts.

(Affidavit of Mark I. Sammon, Paragraph 6, (R. 51))

(9) Pursuant to the aforesaid requests made by Murray to Wright, Murray, on December 31, 1951, received a partial (or progress) payment in the amount of $510,827.67. Exhibit 11 (R. 259-261) is a copy of the Remittance Advice covering such payments kept by Murray, with the check number and date of receipt duly inscribed thereon in the regular course of business pursuant to Murray's regular, usual and ordinary system of record keeping and accounts.

(Affidavit of Mark I. Sammon, Paragraph 7, (R. 51))

(10) The prime contractors, Wright and Kaiser, in turn promptly used the above amounts of partial payments made by them to Murray as a basis for their own respective requests for partial payments from the United States Air Force under their own letter prime contracts. Wright received partial payments from the government equal to 75% of the $510,827.67 it had paid Murray as partial payments and Kaiser received partial payments from the Government equal to 90% of the $163,949.20 it had paid Murray as partial payments.

(See affidavits of Nicholas Dykstra and E. R. Jones, with vouchers attached thereto as exhibits.) (R. 59-76)

(11) The United States Air Force representative (i) inspected goods produced by Murray under each subcontract at the Murray plant in Detroit, (ii) audited Murray cost

data and approved Murray's requests for partial payments, (iii) participated in Murray's negotiations with prime contractors on price redetermination and approved the same before they became effective after the prime contractor effected an agreement on redetermination with the government on the prime contract, (iv) approved any Murray authorization and payment of overtime, (v) reviewed Murray's accounting procedure and spot-checked its costs, and (vi) reviewed and proposed revisions to Murray's accounting procedure to conform with government requirements under Air Force supervision of the prime contracts. The foregoing was done to effect clearance for the prime contractors with the Air Force under the prime contracts, because the goods were produced by Murray for use under such prime contracts and constituted an element of cost thereunder (R. 86-7).

(12) The following was the situation on January 1, 1952, the assessment date—

(a) Tools already owned and furnished by the United States Government to plaintiff Murray under a separate facilities contract were not assessed and therefore are not involved in this dispute.

(b) Among the items plaintiff Murray was required to produce or acquire under the subcontracts here in question were certain tools.

(i) Such tools as had been completed by Murray under the subcontracts prior to January 1, 1952, were not assessed and are not a subject of this suit. Such completed tools remained in the possession of plaintiff Murray for its use in production of goods under the subcontracts in question.

(ii) Such tools which were in process and uncompleted prior to January 1, 1952, were included in the assessed property by the Assessors.

(c) No supplies or subassemblies (end products made by Murray) had been completed, inspected or delivered to either of the prime contractors by Murray under said letter subcontracts prior to January 1, 1952 and all such uncompleted property was subjected to the assessment here in dispute. (Stipulation No. 1, Paragraphs 3, 4 (a), (b), (c), and 5 (R. 82)).

(13) Included in the property assessed to Murray by the City of Detroit and County of Wayne on January 1, 1952, were parts, materials, inventories, work in process and nondurable tools which had been acquired or produced by Murray for the performance of its aforesaid letter subcontracts with Kaiser and Wright (Exhibits 2-A, B, C and 5-A, B) (R. 169-183).

(Affidavit of Mark I. Sammon, par. 12, (R. 56-57))

(14) Such assessed property was clearly identified on, prior and subsequent to January 1, 1952. This was done by tagging, labeling or by segregation, all according to such letter subcontract by number and description. This property was completely segregated from personal property owned and used by Murray in connection with the conduct of its regular business. Murray aircraft operations were all entirely separated from its automotive and other type operations (R. 97).

(15) None of the property in Murray's possession on assessment date (January 1, 1952)—which was the subject of the disputed assessment here—was acquired, produced or used by Murray for any purpose other than the performance of the Murray-Kaiser and the Murray-Wright subcontracts for components or parts for military aircraft or engines which Kaiser and Wright in letter prime contracts with the United States Air Force (Exhibits 1 and 4) had agreed to produce for the Federal Government in furtherance of the National Defense effort.

(Affidavit of Mark I. Sammon, par. 13, (R. 57-59))

(16) The policies of insurance held by Murray—contrary o the suggestion of Appellants in their brief, page 16,—took ognizance of the Government's ownership of certain property in Murray's possession, and covered the following:

> "All real and **personal property** of the insured, including manuscripts, mechanical drawings, tools, dies, jigs, and patterns, their own, or held by them in trust or on commission, or on consignment, or **sold but not delivered or removed,** or **for which they are liable,** all **while located** in and/or **on the premises** occupied by the insured." (Stipulation No. 1 (R. 83))

(17) Appellants state that "no change was made by appellee in its accounting procedure or methods pertaining to said personalty after receipt of a partial payment than were in effect before" (p. 17 of Appellants' Brief). This statement is taken from context and is incomplete. As stated in Stipulation No. 4, par. (7) (R. 96), Murray intended from the very beginning to have a partial payment clause in its contract and designed its accounting treatment **from the very beginning** as though it were operating under existing partial payment clauses.

(18) Appellants also state that "there was no different physical action or treatment in handling and dealing with the property in question after receipt of partial payments than before" (p. 18 of Appellants' Brief). Here again, the statement is taken from context and is incomplete. Murray did not change its action or treatment in handling the property acquired and produced under the aforementioned subcontracts because it was intended from the beginning that there be partial payment clauses in said subcontracts and Murray accordingly treated the property as Government-owned by tagging, labeling and segregating by contract number with code references to each contract (Stipulation No. 4, par. (8) (R. 97)).

(19) Murray has not billed nor been directly paid or reimbursed for the specific amount of 1952 personal property taxes paid under protest involved in this suit. It included an amount equal to the amount of such taxes paid by it as an element of burden in computing costs submitted for forward price determination and retrospectively as to goods completed and delivered prior to the date of the first price redeterminations. The redetermined prices involved a matter of negotiation and trading, give and take, on all cost items, of which this is one of many, and the price so determined in each instance was not that specifically requested by Murray (Stipulation No. 2, par. (3) (R. 87), Stipulation No. 4, par. (13) (R. 99) and Deposition of Mark I. Sammon, pp. 101-117). At all events, no price redetermination was made prior to the institution of the consolidated actions herein (Stipulation No. 2, par. 6 (R. 88)).

Murray made no assignment of its claim for refund of the 1952 personal property taxes paid by it, under protest, to anyone[7] (Stipulation No. 4, par. (13) (R. 99)).

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[7] Under the Michigan statute pursuant to which Murray instituted this action for recovery of the taxes paid under protest, Murray is the only party permitted to maintain said action.

> "**The person paying** (any real or personal property tax) under such protest may, within 30 days and not afterwards, **sue** the township for the amount paid, **and recover,** if the tax or special assessment is shown to be illegal for the reason shown in such protest:***" (C.L. 48, Sec. 211.53, M.S.A. Sec. 7.97).

To the extent that recovery herein by Murray relates to an element of cost for which price redetermination was made, if ascertainable, Murray has advised Government officials that it intends to repay such amount, less the cost of litigation, to the United States Government (Stipulation No. 4, par. (13) (R. 99-100)).

SUMMARY OF ARGUMENT

This case is of national importance. It involves the power of local subdivisions of state governments to impose an ad valorem tax upon personal property in the possession of defense contractors, title to which is vested in the United States Government under standard and widely used partial payment clauses contained in procurement contracts for defense work for the Government, which clauses are permitted by law and are provided for under applicable procurement regulations.

The taxes here in question are **ad valorem propety taxes** assessed pursuant to the Michigan General Property Tax Law (206 of the Public Acts of Mich. 1893, as amended (6 Mich. Stat. Anno. Sec. 7.1-7.243)) and the Charter of the City of Detroit (Title VI, Chapter II, Section 1).

The tax is levied and assessed upon **property,** though collection may be enforced against the owner or, under certain circumstances, the person in possession. The tax is not a specific or privilege tax assessed against the taxpayer. *Detroit* v. *Phillip,* 313 Mich. 211; *Pingree* v. *Auditor General,* 120 Mich. 95, 102, 109.

If the title to and ownership of the property assessed was vested in the United States, the assessment is clearly void because such property owned by the United States is immune from taxation, even though in the possession of Murray. *United States* v. *Allegheny County,* 322 U.S. 174 (1944), *Van Brocklin* v. *Tennessee,* 117 U.S. 151 (1886); see *Kern-Limerick, Inc. and United States* v. *Arkansas.* 347 U.S. 110, 123, and footnote 14 therein; compare *Esso Standard Oil Co.* v. *Evans,* 345 U.S. 495 at 499 (1953).

On the other hand, if the partial payments clause was invalid under Federal Law or if the title under the partial payments clause was only a bare lien or security title—as Appellants contend—and ownership in fact remained in Murray on the tax assessment date, then under both Michigan and

Federal law the property was not immune from taxation and the assessment was valid. That is the basic issue presented by this case.

(i)

Appellants cannot collaterally attack the authority for and validity of the inclusion of partial (progress) payment-title vesting provisions in procurement contracts or subcontracts, for defense materials for the United States, to which neither of Appellants is a party.

American Smelting Co. v. *United States*, 259 U.S. 75; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Friend* v. *Lee*, 221 F. 2d 96 (1955).

(ii)

The Partial Payment Clauses Vesting Title in the Federal Government in the Murray Subcontracts were Authorized, Effective and Valid.

Appellants' contention that the Air Force procurement officers lacked authority to provide for the inclusion of partial payment clauses in the subcontracts here involved, transferring title to aircraft parts and components to the United States upon Murray's receipt of a partial payment upon the purchase price is contrary to express statutory provision, regulations and the decisions of the Court.

The subcontracts here involved and the prime contracts under which they were entered into were negotiated pursuant to authority contained in the Armed Services Procurement Act of 1947, 62 Stat. 23(a), Sec. 4a, (41 U.S.C.A. Section 151(c)) and regulations promulgated pursuant thereto. Following the enactment of the Armed Forces Procurement Act of 1947, the Secretaries of the respective departments of defense (Army, Navy and Air Force) promulgated and issued joint regulations commonly referred to as the "Armed Services Procurement Regulations," which regulations contained and authorized the specific partial payments clauses incorporated in the subcontracts here in question. Similar regulations were in force at the time the Act was enacted.

This very section of the Armed Services Procurement Act of 1947—Section 4a—was recently considered by this Court in *Kern-Limerick*, supra, (1954), wherein it was held that Congress had granted wide discretion to the defense procurement agencies in determining the type of contract which would promote the best interests of the Government.

It has long been recognized that as an incident of the general right of sovereignty the United States may, within its Constitutional powers, through its various departments, enter into contracts which are not prohibited by law and are appropriate to the exercise of such powers (*Kern-Limerick*, supra; *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 154 (1886); *United States* v. *Linn*, 15 Pet. 290, 315-316 (1841); and like a private individual may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Heim* v. *McCall*, 239 U.S. 175 (1915); *Ellis* v. *United States*, 206 U.S. 246 (1907); *Atkin* v. *Kansas*, 191 U.S. 207 (1903).

Thus in the absence of prohibition procurement officers clearly have authority to include partial payment-title vesting clauses in defense contracts. The inclusion of such provision is manifestly within and appropriate to the just exercise of powers granted to procurement officers by the Armed Services Procurement Act of 1947.

The fundamental error in Appellants' contention lies in their failure to recognize the clear distinction between "advance payments" and "partial payments" despite the fact that the Armed Services Procurement Regulations specifically distinguish between such payments. Partial **payments upon the purchase price,** in an amount less than costs expended, do not fall within statutory prohibitions relative to advance payments which are in the nature of a loan. The practice of using partial payment clauses in procurement contracts has been followed for over 70 years. The validity of such partial payment clauses with title vesting in the Government has been recognized and affirmatively approved by the courts, the Attorney General, the Comptroller General and the Armed

Services. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); In re *Read York*, 152 F (2d) 313,316 (1945); 20 *Opinions of Atty. Gen.* (U.S.) 746, 747 (1894); 29 *Opinions of Atty. Gen.* 46, 48; *Comptroller Gen. Decision* No. B-83260, 4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949); *Opinion of Judge Advocate Gen.*, SPJGC, (1945) 101118; 4 Contract Cases Fed. (C.C.H.) Sec. 60,016.

(iii)

Absolute Title and Beneficial Ownership of the Property in Question was Vested in the United States.

It has long been recognized that where Federal procurement contracts so provide, title to material on hand and goods in process, in the possession of a contractor, vests in the United States upon receipt by the contractor of a partial payment upon the purchase price. Such title in the United States is absolute and complete—not bare legal title for security purposes—and the property thus acquired is immune from state and local ad valorem taxes, *United States* v. *Ansonia Brass & Copper Co.*, supra; In re *Read York*, supra; *Douglas Aircraft Co.* v. *Byram County*, 57 Cal. App. (2d) 311 (1943); *Craig* v. *Ingalls*, 192 Miss. 254 (1942); *Superior Shipbuilding Co.* v. *Beckley*, 175 Wis. 337 (1921); *Wright Aeronautical Corp.* v. *Glander*, 151 Ohio 29 (1949).

The Partial payment clause clearly contemplates ~~that~~ the **Contractor** (Murray) shall **sell** and the **purchaser** shall **buy** and as partial payments are made **before completion** title to the goods and beneficial ownership thereof shall vest in the United States, *Ansonia*, supra. The subassemblies manufactured were made under Government specification, were Government inspected, for use in completed aircraft by the Air Force, to be fully and completely owned by the United States in every sense of the word ownership. The partial payments were not loans or advances to the Contractor, but were payments upon the purchase price (See Armed Service Procurement Regulations 1 CCH Gov't Contracts Rep. Para 10,411). Title was not security title, since there was no debt to secure.

Title and beneficial ownership, in United States, as buyer, and immunity, such as obtains here as in *Ansonia,* is to be distinguished from a bare vendor's lien or security title in the United States, as Seller, where beneficial or equitable ownership is in a non-government buyer, *S.R.A.* v. *Minn.* 327 U.S. 558.

Appellants' contention that the contract provisions and the conduct of the parties, in dealing with the assessed property, were inconsistent with absolute title in the United States is without foundation. Virtually every argument advanced by Appellants in an attempt to support such contention was rejected by this Court in *Allegheny* and *Ansonia,* supra.

(iv)

Property Owned by the United States is immune from State and Local Ad Valorem Property Taxes even though it is in Possession of a Private Contractor.

Appellants' argument that the "incidence" of the tax is upon Murray because they assessed the property and sent the tax bill to Murray is without validity. The "incidence" of the ad valorem personal property tax here involved is upon the property and not upon the person to whom the tax bill is sent. *Detroit* v. *Gray,* 314 Mich. 516, 521, and *Pingree* v. *Auditor General,* supra. The power to tax is based upon jurisdiction over the property and not the person. *Detroit* v. *Phillips,* 313 Mich. 211; see *Allegheny.* This is unlike the privilege tax cases cited by Appellants where the incidence of the privilege taxes was upon the Contractor, exercising the privilege. Furthermore, renunciation of a lien on Government property hardly establishes that it is not being taxed, *Allegheny,* p. 187. This Court, in unequivocal language, held in *Allegheny* that Government owned property is immune from state and local ad valorem taxes either as against the Government or the person in possession of such property. See *Kern-Limerick,* 347 U.S. 110, 123.

Immunity of Government property may be waived only by Congress and therein lies Appellants' remedy, if any, *Allegheny,* supra, p. 177.

ARGUMENT

I.

May Appellants Collaterally Attack the Authority for and Validity of the Inclusion of Partial (Progress) Payment—Title Vesting Provisions in Procurement Contracts or Subcontracts, for Defense Materials for the United States, to Which Neither of Appellants is a Party?

The Court Below did not Decide this Question. Appellee Contends the Answer Should be "No."

Although the matter was presented and decided on the merits, the District Court observed that (R. 119):

> "there is some doubt concerning the propriety of a collateral attack by a city and a county upon the validity of a provision in a contract existing between parties to such contract when neither city nor county is itself party to said contract, and when the overall picture is as it is here."

The Court of Appeals did not comment on this issue.

The inclusion of the partial payment clauses in the Murray subcontracts was clearly authorized by the Armed Services Procurement Act of 1947 and regulations promulgated thereunder (see discussion, infra, pages 34-61). However, there appears to be compelling authority to support the proposition posed by the District Court that the appellants do not have the right to collaterally attack and challenge the validity of the title vesting clause in question.

In *American Smelting Co. v. United States*, 259 U.S. 75, it was argued that a contract with the Government for the purchase of copper was invalid since the agreement was not made by advertising in accordance with Federal statutory requirement. In an opinion rendered by Justice Holmes, this

Court ruled that such a defense was not available since the statutory requirements were solely for the benefit of the Government.

> " . . . It is argued that there was no valid contract since the agreement was not made by advertising and not within the exceptions . . . " (page 78).

> "We may lay the the latter objection on one side . . . Moreover **the statutory requirements were for the protection of the United States, not of the seller.** *United States* v. *N. Y. and Puerto Rico S.S. Co.*, 239 U. S. 88."

In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 it was argued that the Secretary of Labor had exceeded his authority to establish certain minimum wage rates upon persons contracting with the Government under the Public Contracts Acts of June 30, 1936 (49 Stat. 2036) and prospective bidders sought to restrain Government purchasing officials from carrying out the Secretary's administrative wage determination. The Court ruled in unequivocal terms that statutory procedures for Government purchasing are for the sole benefit and protection of the Government, and those other than the Government have no standing to attack the terms and conditions upon which such purchases are made, stating:

> "Section 3769 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. **It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders . . . the duty is owing to the Government and to no one else"** (page 126).

> "In this legislation Congress did no more than instruct its agents who were selected and granted final authority **to fix the terms and conditions under which the Government will permit goods to be sold to it.** The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal. In both instances

> prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. **Respondents have no standing in court to enforce that responsibility** or to **represent the public's interest in the Secretary's compliance with the Act."** (p. 129).

This Court further pointed out that the acts of executive officers charged with purchasing needed goods and supplies for the Government are free from judicial interference or restraint—

> "Courts have never reviewed or supervised the administration of such an executive responsibility even where the executive duties 'require an interpretation of the law.' Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government." (p. 128)

> "It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered." (p. 130)

> "The interference of Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." (p. 132)

In *Friend* v. *Lee*, 221 F. 2d 96 (1955) the Court ruled that statutes regulating contracting procedures of officers of the Federal Government are enacted solely for the benefit of the

Government and that third parties, who unsuccessfully sought the contract, can not attack contracts awarded by the contracting officers.

> "Plaintiff contends that the contract between the defendants and Avis is illegal on the ground that it was entered into without previous advertising for proposals, as 41 U.S.C.A., Section 5 requires. But assuming *arguendo* that the statute is applicable and may have been violated, plaintiff, nevertheless, has no standing to sue to invalidate the contract. **Statutes regulating the contracting procedures of the Federal Government are enacted solely for the benefit of the Government** and confer no enforceable rights upon persons dealing with it. *Perkins* v. *Lukens Steel Co.*, 1940, 310 U.S. 113, 126 . . . In consequence, **plaintiff cannot contest the award of the contract** to Avis, either **as a bidder** or in his capacity **as a citizen** generally." (page 100)

The appellants cannot collaterally attack the validity of the inclusion of partial payment clauses in procurement contracts. The statutory procedures with respect to payment for government purchases—which do not prohibit the inclusion of partial payment clauses in procurement contracts—are solely for the benefit and protection of the Government. As was stated in *In Re American Boiler Works*, 220 F. (2d) 319, at 321 (1955):

> **"In the absence of constitutional inhibitions the sovereign can make such contract as its pleases and no one can object."**

II.

Did the United States Contract Procurement Officers have Authority under Federal Law to Provide for and Approve the Inclusion of Partial Payment-Title Vesting Clauses, in Subcontracts for the Production of Defense Material?

The Lower Court answered "Yes."

Appellee contends the answer should be "Yes."

Under the Armed Services Procurement Act of 1947[8] the Air Force May Use Any Type of Contract and Include Any Type of Clause Therein—Not Prohibited by Law.

Congress expressly provided in Section 4(a) of the Armed Services Procurement Act of 1947, 62 Stat. 23(a) (41 U.S.C.A. Section 153(a) et seq.) that—

> "Except as provided in subsection (b)[9] of this section, contracts negotiated pursuant to Section 151(c) of this title may be of **any type** which in the opinion of the agency

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[8] See Appendix A hereto—The Kaiser contract was entered into pursuant to Sec. 2(c) (1), (41 U.S.C.A. 151(c) (1), (R. 143). The reference in the Joint Appendix to Section 2(c) "(x)" is a printer's error and should read Section 2(c) "(1)" as per the Kaiser contract set forth in Plaintiff's Volume of Exhibits). The Wright contract was entered into pursuant to Section 2(c) (10), (41 U.S.C.A. 151(c) (10)) and was later amended under Section 2(c) (1), (41 U.S.C.A. 151(c)(1)), (191), of the Armed Services Procurement Act of 1947. Proper determinations, findings and delegations were made thereunder in respect to said contracts and the Murray letter subcontracts (Stipulation No. 3, (R. 90)).

[9] Subsection (b) excludes costs plus a percentage-of-costs type contracts, which are not here involved. It further provides for regulations governing cost-plus-a-fixed-fee contracts, which regulations do not prohibit partial payment clauses.

head will promote the best interests of the Government . . ."

This very section of the Armed Services Procurement Act—**section 4(a)**—has been recently considered by this Court in *Kern-Limerick, Inc. and United States of America* v. *Scurlock, Commr. Rev. of Arkansas*, 347 U.S. 110, 116 (1954) wherein the Court held in plain and unequivocal language that—

> "The Government asserts that Sections 4(a) and (b) authorize this contract. Under them negotiated contracts, such as this, 'may be of **any type** which . . . will promote the best interests of the Government.' Under such a provision, it seems that the determination to use purchasing agents is permissible. **Where there is no prohibition** ***of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices.*"**

citing *United States* v. *Linn*, 15 Pet. 290, 316; *Muschany* v. *United States*, 324 U.S. 49, 63.

Appellants contend that **"broad powers of negotiation to enter into any type of contract** did not by the same token include any type of clause" (Appellants' Brief, p. 37). Such contention is contrary to the clear statement and ruling in *Kern-Limerick*, which cited *United States* v. *Linn*, 15 Pet. 290, 316 (1841) wherein the Court specifically rejected the very same arguments which are here made by the Appellants, stating at page 316:

> "It is the duty of all public officers intrusted with the execution of powers delegated to them, to pursue the directions of the law conferring the power. But **to construe all such laws** as a **special delegation of authority, to be strictly and literally pursued; and to consider every departure from it, as done without authority, and absolutely void; would frequently be defeating the very object and purpose**

for which the law is made; and ought not to receive such a construction, unless the statute itself declares all such acts void."[10]

Section 4(a) of the Armed Services Procurement Act of 1947, (41 U.S.C.A. 153) follows the general rule, as supported by the above cases, that absent Constitutional prohibition or Congressional restriction, the Government, as an incident to the general right of sovereignty, may enter into any contract appropriate to the exercise of its powers (*United States* v. *Hodson*, 10 Wall 395; *Neilson* v. *Lagow*, 12 How 98; *United States* v. *Linn*, 15 Pet. 290; *United States* v. *Tingey*, 5 Pet. 115) and like a private individual may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Atkin* v. *Kansas*, 191 U.S. 207; *Ellis* v. *United States*, 206 U.S. 246; *Heim* v. *McCall*, 239 U.S. 175; *In re American Boiler Works*, 220 F 2(d) 319, 321; *Cf. Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565.

Thus, in the absence of a prohibition, express direction or authority to include partial payment-title vesting clauses in procurement contracts is not required. The inclusion of such provisions is within and appropriate to the exercise of powers granted to procurement officers by the Armed Services Procurement Act and regulations promulgated pursuant thereto. This is a complete answer to Appellants' contention (Appellants' Brief p. 32) regarding the requirement of express statutory "direction" to make such partial payments (see also discussion hereinafter at pages 52 to 56 and is not in conflict with any of the authorities cited by Appellants (Appellants' Brief pp. 46-47). There is here all the statutory authority and power required.[11]

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[10] To like effect see *Van Brocklin* v. *Tennessee*, 117 U.S. 151, in which the Court said, at page 154:

> "The **United States,** for instance, as **incident to the general right of sovereignty,** have the **capacity,** within the sphere of their constitutional powers, and through the instrumentality of the proper department, to **enter into contracts** and take bonds, **not prohibited by law,** and **appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act . . .**"

Partial Payment Clauses Vesting Title in the Government in Procurement Contracts are not Prohibited by the Armed Services Procurement Act of 1947 or by any Other Law.

They Have a Long Historical Usage in Defense Procurement and are Presently Authorized and Used in 80% of the Air Force Procurement Contracts.

Nothing in the Armed Services Procurement Act of 1947, (41 U.S.C.A. 151 et seq.) or in any other law prohibits the inclusion of a standard partial payment clause in procurement contracts. Such partial payment clauses—vesting title in the Government—provide for the payment to the contractor or subcontractor of amounts less than the cost of goods acquired and work done under the contract up to the date of such payment (Exhibit 3) (R. 183). Partial or progress payment clauses of this nature have a long historical usage in procurement programs of the military departments of the United States Government, and are a basic and established method of procurement.[12] In fact, such clauses appear in more than 80% of the Air Force Procurement contracts and subcontracts, contractwise, and in a greater percentage, dollarwise (Stipulation No. 2, par. 2) (R. 86).

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[11] "To carry out general authority granted to them by statute, department heads have the power to make appropriate regulations 'not inconsistent with law.'" (See 5 U.S.C.A. 22, as well as 41 U.S.C.A. 156, Armed Services Procurement Act of 1947). This Court has not permitted such regulations to be lightly cast aside, as stated in *Boske v. Comingore*, 177 U.S. 459 at 470 (1900):

> " . . . a **regulation** adopted under section 161 of the Revised Statutes **should not be disregarded** or annulled **unless**, in the judgment of the court, **it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."**

To like effect, see *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349; and *United States v. Morehead*, 243 U.S. 607, 613-14.

The legislative history of the Armed Services Procurement Act of 1947 clearly reflects the intention of Congress to empower defense procurement agencies to exercise the broadest powers of negotiation--not only to enter into contracts "of any type which in the opinion of the agency head will promote the best interests of the Government," but to enable them to work out "all terms" of such contracts which will benefit the Government. This clearly includes the power to provide for the inclusion of partial payment title vesting clauses which have long been a basic part of procurement policy.

Appellants' erroneous interpretation of this legislative history does not support the proposition for which they contend, that while under Section 4(a) of the Act (41 U.S.C.A. 153)–

> ". . . contracts negotiated pursuant to section 151 (c) of this title may be of **any type** which in the opinion of the agency head will promote the best interests of the Government . . ."

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[12] The practice of using partial payment clauses in procurement contracts, the fulfillment of which requires a long period of time and involves considerable sums of money, has been followed for over seventy years to the present day. The validity of such partial payment clauses with title vesting in the Federal Government was affirmatively approved by this Court in *U.S.* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910). To like effect see 20 Opinions of Attorney General (U.S.) 746, at 747 (1894), and a recent decision of the Comptroller General No. B-83260, (1949), 4 Contract Cases, Fed. (CCH) Sec. 60,655.

Congress was only considering **types** of contracts in a limited sense and intended to narrowly restrict procurement officers in the exercise of their duty in respect to the **form and provisions** of procurement contracts and that partial payments in negotiated contracts were not authorized and were **impliedly** prohibited (Appellants' Brief, pp. 37-40).

The bill was sponsored by the Acting Secretary of the Navy and the Secretary of War, and their views were shared by the Procurement Policy Board of the War Production Board composed of representatives of the various contracting agencies of the Government. W. John Kennedy, Acting Secretary of the Navy, wrote to the Speaker of the House of Representatives relative to the presentation of the Armed Services Procurement Act of 1947 and said, among other things,

> "**The primary purpose of the bill** is to permit the War and Navy Departments to award contracts by negotiation **when** the national defense or **sound business judgment dictates the use of negotiation** rather than the rigid limitations of formal advertising, bid and award procedures . . .
>
> "The Bill had its genesis in the Procurement Policy Board of the War Production Board, composed of representatives of the various contracting agencies of the Government. The subject of peacetime procurement methods was considered by this Board from time to time during 1944 and 1945, culminating in the appointment in the fall of 1945 of a special committee to recommend new legislation, **based upon the experiences of the agencies during the war years,** to take effect upon the expiration of the special war legislation. This **committee recommended** that legislation be enacted granting **'authority to negotiate** prices and award **contracts, in** such **form** and **type as may be suitable,** at the discretion of the heads of the agencies.' "

(2 U. S. Code, Congressional Service, 80th Congress, Second Session, 1948, page 1075). Robert P. Patterson, Secretary of

War, in an almost identical letter (2 U. S. Code, Congressional Service, 80th Congress, Second Session, 1948, page 1077) concurred with the Acting Secretary of the Navy. Clearly, the sponsors of the Bill did not intend to narrowly limit procurement officers in respect to the form and provisions of negotiated procurement contracts.

In discussing Section 4(a) which empowers the Armed Services to use contracts of "any type which . . . will promote the best interests of the Government" and against which this Court in *Kern-Limerick* said **"there is no prohibition,"**[13] the Senate Report No. 571, (2 U. S. Code, Congressional Service, 80th Congress, Second Session, 1948, pages 1064 and 1065), among other things, states:

> " 'The right to use the most suitable type of contract is an inseparable adjunct to the right to procure by negotiation . . . Negotiation permits the working out of **all terms,** not just price, and their harmonization in a way which will be most advantageous to the Government. Special provisions adapted to the circumstances of the particular purchase may be of material importance in securing the best possible agreement for the Government . . .' " (pages 1064-1065).

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[13] Dissatisfied with the decision of this Court in *Kern-Limerick v. Scurlock*, Appellants (Appellants' Brief, page 41) make the following inordinate assumption:

> "Examination of the record and briefs filed in the Supreme Court in *Kern-Limerick* v. *Scurlock*, 347 U.S. 110, 98 L. Ed. 546, fails to disclose any reference to these Reports of the Committee Hearings to aid the Court. Appellants are inclined to the belief that had this Court had before it reports of said hearings, the majority opinion would have been otherwise in *Kern-Limerick*."

Reference is made by the Court to the Senate and House reports on the Act (see p. 114, footnote 4 of the Court's opin[illegible]

While it was the intention of Congress to limit and define he instances where the Armed Services might make purhases and contracts by negotiation—as opposed to advertisng—there was clearly no intent to limit or restrict the rocurement officer's powers with respect to the terms and rovisions to be included in such negotiated contracts. This is learly illustrated by the excerpt from the committee hearngs prior to the adoption of the Armed Services Prourement Act of 1947, (*House Armed Services Committee earings*, Vol. 38, Library of Congress, p. 576) quoted by ppellants at pages 40 and 41 of their brief:

> "Mr. Brown: Section 4, subsection (a):
>
> Except as provided in section (b) of this section 4, contracts negotiated pursuant to section 1 may be of any type which in the opinion of the agency head will promote the best interests of the Government.
>
> Mr. Anderson: Without objection, subsection (a) of section 4 is approved as read.
>
> Mr. Cole: What does that mean, that a contract may be of any type?
>
> Mr. Hill: Prior to the war, the type of contract which was generally used was a lump-sum or fixed-price type of contract.
>
> During the period of the war, it was discovered that other types of contractual arrangements could be contrived which conferred benefits on the Government. I have reference to cost-plus-fixed-fee contracts, cost-with-a-predetermined-overhead contracts, time-and-material contracts, so-called incentive-type contracts, and this is intended merely to state that **when you get into the field of negotiated contracts, the agencies are free to make that deal which they regard as the best deal from the standpoint of the Government."**

At the time the Armed Services Procurement Act of 1947 was being considered, Congress was clearly aware of the prevailing policy and practice followed by the Air Force and other Defense Departments to provide by contract for the making of partial payments to defense contractors and for the vesting of title in the United States Government to the war materials being manufactured. That this is so appears from the records of the Subcommittee Hearings, H.R. 1366 (Armed Services Procurement Act of 1947) Document No. 51, dated Feb. 4, 1947, page 580. In connection with a discussion of Section 4(a) of the Act at these hearings, Col. Brannon (later Major-General Brannon, Judge Advocate General of the Army) submitted and filed **"examples of some of the types of contracts which we use now and which we might anticipate using under this authority."** Among such examples of types of contracts was contract form No. 7, being a Letter Order for the manufacture of supplies, in which, among other things, there is a provision, No. 7, reading as follows:

> "(Par. 1307.7) 7. After your acceptance hereof, **partial** and advance **payments, in accordance with regulations**[14] from time to time applicable, may be made to you upon your application."

This directly negates the intimation (Appellants' Brief pp. 41-2) that partial payment-title vesting clauses did not appear in these exhibits before the Congressional Committee. (See pages 608-9 of the above record of Subcommittee hearings on H.R. 1366.) See form of Letter Contract No. 8 (pages 610-11) Par. 7, and War Contract Form No. 9 (pages 612-13) Par. 7, and War Contract Form No. 10 (pages 614-15), Par. 7, containing identical language to Par. 7 quoted immediately hereinabove on page 42.

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[14] At that time in February, 1947, when Congress was considering the Armed Services Procurement Act of 1947, the following regulations were in effect, providing for partial payments and vesting of title in the Government—as distinguished from advance payments, secured by lien—(10 Code of Federal Regulations, 1945 Supp. Pars. 803.330, 803.331 and 803.331(a)). Congress and the Armed Services, who proposed the bill to Congress, certainly were aware of the practice and regulations controlling. Congress did not limit or prohibit the use of such partial payment clauses in the Armed Services Procurement Act of 1947.

Congress certainly was aware of the prevalent use of partial payment-title vesting clauses in procurement contracts. The use of such clauses was not prohibited or restricted. That advance payments were different from partial payments was also recognized. (See discussion hereinafter at pages 49 to 52, and also language in the above-quoted paragraph 7).

Appellants' contention that the Armed Services Procurement Act did not permit contracting officers to use partial payment title-vesting clauses in procurement contracts is unsupported and without merit.

Contrary to the Contention of Appellants, 31 U.S.C.A. 529 (formerly R.S. 3648) does not prohibit the use of partial payment-title vesting provisions in Air Force Procurement Contracts.

31 U.S.C.A., 529 provides that:

> "No advance of public money shall be made in any case **unless authorized by the appropriation concerned or other law.** And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment . . ."

The statute is in the identical form it has always been since 1823 (3 U.S. Statutes at Large, Chap. IX, p. 723), except for the bold-faced words which were added to the statute on August 2, 1946, by Amendment H.R. 4586 (which subsequently became H.R. 6533, Section 11 of which Bill amended 31 U.S.C.A. 529).

This statute, prior to the 1946 amendment, was construed long ago as not prohibiting partial payments which did not exceed the value of services performed or work done, as the work progressed, if **"the United States became the owner of the work paid for."** 20 Opinions of Atty. Gen. (U.S.) 746 at 747 1894).[15]

In their brief filed in the District Court, Counsel for the City did not contend that 31 U.S.C.A. 529 prohibited the making of partial payments prior to the 1946 amendment. However, they contended that the 1946 amendment effected "a most significant change" (City Brief filed in District Court pp. 31 and 32) and served to prohibit the making of partial payments in connection with procurement contracts. As we pointed out in the District Court (Murray Reply Brief pp. 9-14), this contention is utterly fallacious and entirely without basis. The 1946 amendment was very limited in purpose and effect, as shown by the legislative history.[16] It was not directed toward preventing the inclusion of partial payment clauses in Government contracts in amounts not in excess of the value of goods acquired and work theretofore performed, with title vesting in the Government, which for years prior and subsequent[17] thereto have been held not to be within the prohibition of the statute. This legislation was enacted merely "to cut down on Government red tape." The 1946 amendment to 31 U.S.C.A. 529 did not make a "most significant change" in said statute as it previously existed.

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[15] See also 1 Comp. General 143 (1921) relating to partial payments in aircraft procurement contracts.

[16] **"Section 11. Advances of Public Funds.**—The advance of public money generally is prohibited by section 3648, Rev. Stats. (31 U.S.C. 529). **Occasionally,** to meet special needs and particular situations (especially in the case of transactions abroad) it has been found necessary to create legislative exceptions to the general rule. These situations are **comparatively minor** but are apt to require quick legislative action. Section 11 would amend the original section cited **merely** by adding the words 'unless authorized by the appropriation concerned or other law.' Its purpose is **merely** to sanction the incorporation of exceptions in the appropriation acts as may be required from time to time without raising the question of a point of order."

(p. 7 of Senate Report 1636).

To like effect see House Report No. 2186, 79th Congress, Second Session and report of hearing, February 13, 1946, before the Committee on Expenditures in the Executive Department, House of Representatives, 79th Congress, Second Session, H. R. 4586 (which subsequently became H. R. 6533, Section 11 of which Bill amended 31 U.S.C.A., Section 529).

Payments to a contractor or subcontractor—where the amounts of such payments are not in excess of the services theretofore rendered on the goods in process—whether (a) under a partial payment clause vesting title and ownership in the Government or (b) under any nomenclature and secured by lien or otherwise, are not in violation of 31 U.S.C.A. 529. As the Attorney General of the United States said in 29 Opinions of Atty. Gen. 46, at 48:

> "The general rule would therefore seem to be well recognized that, in the absence of statutory prohibition, **partial payments may be made** on account of work done in the construction of vessels for the Navy **if (1) title** to the vessel **shall have passed to the United States at the time of such payments,** or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments."

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[17] In Comptroller General's Decision No. B-83260, 4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949) it was held that a modification of a contract providing for the inclusion of a partial payment clause for partial payments not exceeding the value of work done and goods acquired with title thereto and "all future improvements" vesting in the Government was not in violation of or prohibited by 31 U.S.C.A. 529, as amended. See also Opinion of Judge Advocate General, SPJGC, 1945/101118, Nov. 2, 1945, 4 Bull. J.A.G.A. 474, 4 Contract Cases Fed. (C.C.H.) Sec. 60,016.

Only where payments exceed the value of the work performed prior thereto were such payments prohibited. Section 5 of the Armed Services Procurement Act, 41 U.S.C.A. Sec. 154, was required only to authorize payments in excess of the value of work performed.

It is to be noted that 31 U.S.C.A. 529 permits of payment only to the extent of "the value of the service rendered, or of the articles delivered previously to such payment"—and not (a) in advance of any work being performed or goods being acquired under the contract or (b) to an extent greater than the cost of such services performed or goods acquired prior to such payment. Therefore, to enable procurement officials to make advance payments in connection with military procurement, required a relaxation of the limitation above noted, which Congress authorized in Section 5 of the Armed Services Procurement Act of 1947, 41 U.S.C.A. Sec. 154. Section 154 specifically provides for such advance payments—in contradistinction to partial payments such as are here involved—under certain conditions which require specific determinations by the Agency Head[18] that such payments (i) are in the public interest or in the interest of national defense (ii) are necessary and appropriate in order to procure required supplies and may include a security provision, including a lien in favor of the Government paramount to all other liens upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such material and other property acquired for performance of the contract. Thus, the suggestion that 31 U.S.C.A. 529, as amended in 1946, requires an express and specific statutory "direction" by appropriation or other law to make the partial payments question and that such direction and limitation as found in 1 U.S.C.A. 154 (Appellants' Brief, page 38) is fallacious. xpress authorization by the appropriation concerned or ther law is required for "advance payments" of the charac-er prohibited by 31 U.S.C.A. 529. However, partial payments ith title vesting in the Government, such as are here in uestion—where the payments are not in excess of the value f work theretofore performed or goods theretofore acquired nd the amount of the payment has actually been earned by he contractor and the United States has received an equiva-ent in value therefor—are not and have never been within the rohibition of the Act.

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[18] This determination, unlike many other important determinations, may not be delegated to others by the Agency Head. See 41 U.S.C.A. Sec. 156(b).

No such authority was required for partial payments less than the value of work performed prior thereto.

Nothing in this section of the Armed Services Procurement Act of 1947, 41 U.S.C.A., Sec. 154, prohibits partial or progress ayments to an extent less than the value of services per-ormed and goods acquired prior thereto, if the United States overnment is vested with the title thereto and becomes the wner thereof. Thus, contrary to the argument of Appellants, he standard and long-used partial payment clauses here in uestion are not prohibited.

The Procurement Regulations in force at the time the Murray contracts were entered into authorized standard partial payment clauses.

Following the enactment of the Armed Services Procurement Act of 1947, the Secretaries of the respective departments of defense (Army, Navy and Air Force) promulgated nd issued joint regulations for the armed forces commonly eferred to as the "Armed Services Procurement Regulations" 32 Code of Fed. Regulations, 1949 Edition (1950 Pocket Supplement), Part 400-428, pages 28-210.

Said Armed Services Procurement Regulations became ffective May 19, 1948 (32 Code of Federal Regulations, Sec. 400.103, 1949 Edition (1950 Pocket Supp.)) and specifically rovided (Sec. 400.102) that:

> "Rules, **regulations,** and directives of any D"partm
> or Departments **not in conflict with this subchapter,**
> from time to time amended, **shall remain in full force**
> **effect.** This subchapter is not intended to cover deta
> procurement procedures or instructions of the respec
> Departments and their procuring activities, all of wh
> procedures and instructions may be prescribed as
> vided in Sections 400.106 and 400.107."

At that time there was an army procurement regulation
effect, which also pertained to procurement by the Depa
ment of the Air Force (Title 10, Code of Federal Regu
tions, 1947 Supp. Chap. VIII, 801.100; 12 Fed. Regist
page 7670, November 18, 1947) which army procureme
regulation specifically provided for partial payments—le
than the value of services performed and goods theretofo
acquired—as work progressed, with title vesting in the Unit
States immediately thereupon to all goods theretofore a
subsequently acquired. This provision of the regulation
commonly known as APR 5-407.2 (Title 10, Code of Fe
Regulations, 1947 Supp., Chap. VIII, Sec. 805.407-2; 12 Fe
Register, page 7693, Nov. 18, 1947, Exhibit 3 (R. 183) and s
Appendix B hereto). The regulation also contained the la
guage of a specific partial payment clause and this specif
clause was incorporated in the Murray-Kaiser letter subco
tract as Paragraph 11 thereof (See Exhibit 2B[19] (R. 174-177)
see also reference thereto in original letter subcontract betwee

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[19] The reference in the first portion of the Kaiser-Murray lett
sub-contract of March 23, 1951, Exhibit 2-A, (R. 170), is to AP
5-407.2(1), but in the Amendment of August 15, 1951, (R. 174
which incorporates the clause verbatim, the reference thereto is t
JPR 5-407.2(1), which reference is the same as the previous AP
reference, except that Army Procurement Regulations becam
known as the Joint Procurement Regulations after the Air Forc
was transferred procurement responsibilities pursuant to the Na
tional Security Act of 1947 (Joint Army and Air Force Pro
curement Circular No. 1, 15 January, 1948).

Murray and Kaiser dated March 23, 1951, Exhibit 2A, par. 4 (R. 170)). This same clause was also incorporated by reference in the Murray-Wright subcontract, Exhibit 5A, par. 5.[30] (R. 219).

Contrary to Appellants' statement (Appellants' Brief, page 46), Appellee does not base its position with regard to the validity of the partial payment-title vesting provisions here involved upon Procurement Regulations alone. The regulations authorizing the use of partial payment clauses were made pursuant to and in consonance with the authority of the Armed Services Procurement Act of 1947. Appellants' attempt to delimit the authority granted by the Armed Services Procurement Act of 1947 fails to find support in the Act itself, the legislative history or the regulations issued pursuant thereto and is contrary to the controlling pronouncement of this Court in *Kern-Limerick*.

The Regulations expressly recognize and point out the difference between Partial Payments on Account as the work progresses and Advance Payments made in advance of any work or in excess of the value of work theretofore performed.

The Armed Services Procurement Regulations also contained specific regulations relating to advance payments—as distinguished from partial and progress payments—32 Code of Federal Regulations, 1949 Ed., 1950 Pocket Supp., Chapter IV, Sub-part E, Sections 402.500-402.505. As pointed out hereinabove, these advance payments, as authorized by the Armed Services Procurement Act of 1947 (41 U.S.C.A. 154), are for advance payments before any work is performed or materials are acquired, or in excess of the value of work performed or materials acquired. Section 402.501 specifically distinguishes between advance and partial payments a follows:

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[30] See Affidavit of Mark I. Sammon, par. 2 (R. 47), re ASPR 5-407.2, which appears under Statement of Facts, supra, page 17, footnote 5.

> **“Nature of advance payments.** Advance payments shal be deemed to be payments made by the Government to contractor in the form of loans or advances prior to an in anticipation of complete performance under a contract. **Advance payments are to be distinguished from ‘partial payments’ and ‘progress payments’ and other payment made because of performance or part performance of contract.”**

It will further be noted from Sections 402.502-402.505 tha unlike partial payment provisions for payments less than th value of services theretofore preformed or goods theretofor acquired or produced, the provisions for advance payment require compliance with those sections of the Armed Service Procurement Act of 1947 (41 U.S.C.A. 154) which specifically require (i) security, (ii) that the agency head himsel determine that advance payments are necessary to procur supplies, and (iii) security provisions, with payments bein placed in a segregated bank account subject to withdrawa only upon authorization of the contracting officer, togethe (iv) with provisions for a lien in favor of the Governmen

No such provisions appear in connection with partia payment clauses where title and ownership vests in the Government.

The Department of the Air Force issued additional procurement procedures to implement the Armed Services Procurement Regulations (32 Federal Code of Regulations 194 Ed. 1950 Pocket Supp. Section 1000.101, effective October 1 1950) referred to hereinabove, and specifically recognized th existence of partial payment provisions in Procurement Contracts and noted the differences between such payments an advance payments. 32 Code of Federal Regulations 194 Ed. 1950 Pocket Supp. Chapter VII, Subpart E, Sectio 1002.501-1002.505. Section 1002.501 specifically provides:

"Sec. 1002.501. Financing of Government Contracts for supplies and services—(a) Policy. The policy of the Air Force is to require contractors furnishing supplies or services to be able to perform the contract with their own funds or with private financial assistance. **In negotiated procurements, Government assistance may be granted contractors** by providing for expeditious reimbursements to contractors for proper expenditures under cost and cost reimbursement type contracts and **by the use of partial payments** in connection with fixed price contracts. The benefits of Government assistance to the contractor should be reflected in the negotiations of any particular procurement.

"(b) **Exceptions. Exceptions to the above policy may be made** in such instances in negotiated procurements **where the contractor** is particularly adapted in the supplying of the items or services to be procured but **whose capital is limited and where commercial or private financing is unobtainable. In such cases,** consideration will be given to the use of Government financing **by way of advance payments** under such terms and conditions as the Under Secretary of the Air Force may prescribe."

Appellants' reference to "Advance-Partial Payments" (Appellants' Brief, p. 46, et seq.) in an effort to construe partial payments and advance payments as being alike ignores controlling regulations in force at the time the contracts were entered into, the language of the statutes regulating advance payments—as distinguished from partial payments—and the basic differences between the partial payments and advance payments.

As stated above, advance payments are payments made in advance of any work being performed or goods being acquired or in an amount greater than the cost of such services performed or goods theretofore acquired. Partial payments, such as are here involved, where title vests in the Government and the payments are not in excess of the value of work theretofore performed or goods acquired are entirely different from advance payments.

Contrary to Appellants' contention, neither 31 U.S.C.A. 529, as amended, nor any other Act of Congress indicates the necessity of express statutory "direction" for the use of partial payment-title vesting clauses in Procurement Contracts.

As has been pointed out immediately hereinabove, there i nothing in 31 U.S.C.A. 529, as amended in 1946 or prio thereto, which either prohibited or required express and specific statutory "direction" for the inclusion of title vesting partial payment clauses in procurement contracts.

This Court in the *Kern-Limerick* case, supra, clearly hold that contracting officers are free to enter into such types o contracts in such form and with such clauses as good business practice warrants. Under *United States* v. *Linn*, supra cited by the Court in *Kern-Limerick* the Court held and i *Van Brocklin* v. *Tennessee*, (See ante, pages 35 to 37) th Court said that—such governmental officers may

> **"enter into contracts . . . not prohibited by law . . . appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislativ act."**

The inclusion of title vesting-partial payment clauses in procurement contracts by contracting officers is not prohibite and falls within the scope of power and authority vested i them under the Armed Services Procurement Act of 1947

Notwithstanding, Appellants (Appellants' Brief, page 33-37) refer to certain other legislation relating to the use o partial payments as work progresses, and seem to infer therefrom that in order to permit the use of partial payment here, specific Congressional direction is necessary. The legislative history of the laws to which counsel refer clearly negates such an inference.

For example, reference is made by Appellants (Appellants' Brief, page 33) to 34 U.S.C.A., Section 582, dealing with partial payments in Navy contracts **with provision for a lien in favor** of the Government paramount to all other liens. The legislative history of that law, adopted in 1911, clearly demonstrates that it was not enacted in order to enable the Secretary of the Navy to make partial payments—because the making of such partial payments without express statutory direction, where title vested in the Federal Government, had long been recognized as not prohibited by Section 3648 of the Revised Statutes (31 U.S.C.A. 529). It will be noted that the Attorney-General expressly recognized the validity of partial payments with title vesting in the Government.[21] However, where the Navy followed the practice of contracting for a lien to secure partial payments, he expressed some question as to whether courts would sustain such liens ~~as~~ paramount and superior to liens created under state laws. Therefore, the Committee report stated—

> "In view of the opinion of the Attorney-General set forth above, that in the absence of such legislation it is impossible to state what the courts will hold owing to the difficulty arising **with respect to the creation of a lien** . . . the Committee deems the legislation necessary."

(Report No. 39, 62nd. Congress, First Session, House of Representatives, May 26, 1911, to accompany H.R. 9442).

The Act of ~~October 6, 1917~~ (40 Stat. 383) referred to by Appellants (Appellants' Brief, page 33) does not relate to partial payments. It relates to advance payments in excess of the value of services performed or goods acquired, which payments, as pointed out above, are entirely different from partial payments and are not here involved.

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[21] 29 Op. Atty. Gen. (U.S.) 46, [illegible] (See page 45 supra). This opinion was considered by the Congressional Committee and was incorporated ~~in~~ full in the Com[illegible] Report No. 39 referred to above.

Title 50, U.S.C.A. 1151, referring to partial payments, expressly specifies that such payments by the Navy shall "be subject to a lien as provided by the Act of August 22, 1911" (37 Stat. 32; 34 U.S.C. 582). Therefore, it may fairly be said that since the purpose of statutory authorization in 34 U.S.C.A. 582 was to make certain that the lien to be given to the Government would be paramount, the same purpose obtained in connection with 50 U.S.C.A. 1151. The law was not necessary to authorize partial payments where absolute title vested in the Government, which have always been recognized as not prohibited by 31 U.S.C.A. 529, but was enacted to insure the status of the lien as paramount.

The reference to 50 U.S.C.A. 611 (Appellants' Brief, page 34) is no authority for the proposition that explicit statutory direction is necessary to make partial payments which are not in excess of the value of services performed and work done prior thereto and not prohibited by 31 U.S.C.A. 529—which is the situation in the case at bar **where title is vested in the United States Government.** Section 611 is a very broad statute empowering the President to authorize any department or agency exercising functions in connection with national defense to enter into contracts and amendments thereto and "to make advance, progress and other payments thereon, **without regard to the provisions of law** relating to the making, performance, amendment, or modification of the contract whenever he deems such action would facilitate the prosecution of the war . . ." The effect of this statute in part is to permit advance payments notwithstanding the general prohibition of 31 U.S.C.A. Section 529, and to permit progress (or partial) payments even under circumstances in which they might otherwise violate 31 U.S.C.A. 529—that is, with-

e-vesting or lien and in excess of the value of work
goods acquired. Progress (partial) payments are not
ed by Section 529 when the Government obtains title
erty the value of which is at least equal to the amount
payments. This is supported by the very language of
C.A. Section 529, by opinions of United States Attor-
eneral and by Congressional Reports. Both Senate
911 and House Report 1507 (77th Cong., 1st Session)
ing the bill which became Section 611, contained an
ix in which the following statement was made:

'III Provisions Concerning Advance and Partial Pay-
nts.

'A. 31 U.S.C., Sec. 529 is a general prohibition against
ying for any Government purchase before delivery or
fore title is taken to it."

ss (partial) payments may, however, conflict with
529 **when the Government does not obtain title**. Section
minates the possible conflict in the latter situation.
t that Section 611 has the effect of authorizing certain
ss (partial) payments otherwise prohibited cannot be
sis for an inference that **all** progress (partial) pay-
would be prohibited in the absence of Section 611.

.S.C.A. 154 of the Armed Services Procurement Act
(Appellants' Brief, page 34) lends no support to the
ition that express Congressional direction must be
d in order to permit partial payments where title
n the Government and the payments are not in excess
value of work theretofore performed or goods thereto-
cquired. Section 154 deals with advance payments
may be (a) in advance of any work being performed
ds being acquired, or (b) in an amount greater than
st of such services performed or goods theretofore ac-
. Therefore, 41 U.S.C.A. 154 was enacted to confer
ity theretofore limited by 31 U.S.C. 529 (see page 46,

supra.). The same may be said about 41 U.S.C. 255, referred to by Appellants (Appellants' Brief, page 36).

Appellants argue that "nowhere in any of the preceding statutes . . . do we find any statutory provision authorizing vesting of title . . . The statutes provide for a paramount lien only . . ." (Appellants' Brief, page 36). The above legislative history, as appears from the various Congressional Reports, clearly indicates that Congress has always recognized that no express direction or authority was necessary for the making of partial payments in an amount not in excess of services performed or the value of goods theretofore acquired where title vested in the United States Government and that such payments are not prohibited under 31 U.S.C.A. 529. Wherever partial payments are mentioned in legislation in connection with liens, the law does not restrict the Defense Department to a lien and prohibit the Government from taking title. However, where a lien is taken such laws were enacted to make certain that such lien should be "paramount to all other liens." No specific legislation is required for the Government to take absolute title to goods being manufactured for it where it has made a partial payment on account of the purchase price. (See pages 43 to 47, supra.)

Contracting Officers have Authority to use Partial Payment Clauses in Procurement Contracts.

As pointed out hereinabove, there is nothing in the Armed Services Procurement Act or regulations which requires a specific finding on the part of the Secretary in connection with partial payments as contrasted with the requirements for advance payments. Consequently, there is authority in the Contracting Officer through the delegation to him of procurement responsibilities to use the partial payments clause where he deems it necessary in carrying out his procurement responsibilities, and there are no prohibitions against delegating to the Contracting Officer authority so to do. However, there are prohibitions against such delegation in the case of advance payments.[22]

General authority of an Armed Services Department Secretary or Agency Head to delegate to others, procurement responsibilities – not otherwise prohibited – is specifically provided for in the Armed Services Procurement Act of 1947, Section 10 (41 U.S.C.A. Section 156):

> "The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions in his discretion and subject to his direction, to any other officer or officers or officials of the agency."

See also Section 7 relating to determinations and delegations. Also see 32 Code of Federal Regulations 1949 Ed. 1950 Pocket Supp. Section 100.402 regarding general authority of Contracting Officers, and also Section 1000.400 which sets forth procurement responsibility of the Commanding General, Air Materiel Command, and authorizes delegation of procurement authority and the appointment of Contracting Officers.

The parties expressly stipulated and agreed, (Stipulation 3) (R. 90), that the letter prime contracts and the letter subcontracts and the definitive contracts, thereafter executed by the United States Air Force and Wright, Kaiser and Murray respectively, (a) were negotiated by Contracting Officers of the Air Force who were duly appointed as such and that appropriate authority so to do had been delegated to them in accordance with the Armed Services Procurement Act of 1947 and regulations promulgated thereunder, and (b) such determinations and findings as were required by said statute or regulations thereunder were made at or prior to the time of execution of such contract. However, appellants reserved the right to question whether the terms of such contracts, including the partial payment clause, could lawfully be incorporated therein.

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[22] "The power of the agency head to make the determinations or decisions specified in . . . Section 154(a) of this title shall not be delegable . . ." (41 U.S.C.A. 156(b)).

From the foregoing there can be no valid basis for any conclusion, other than that—

> (1) partial payments clauses of the character in question may be used, and are not prohibited under the provisions of the Armed Services Procurement Act of 1947;[23]
>
> (2) partial payments clauses are specifically authorized by the regulations and procedures of the Departments of Defense and Air Force; and
>
> (3) such partial payment clauses are not prohibited by any other law.

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[23] Appellants concede that no "express prohibition against partial payments appears in the Armed Services Procurement Act of 1947" (Appellants' Brief, p. 32). Contrary to Appellants' contention, there is likewise no provision in the Armed Services Procurement Act of 1947 or any other law which implies that partial payments are prohibited. Had Congress intended to prohibit or restrict the long-standing use of partial payment clauses in procurement contracts it would have expressly done so in the Armed Services Procurement Act of 1947. As stated in *Robertson* v. *Labor Board*, 268 U.S. 613, 627, "it is not lightly to be assumed that Congress intended to depart from a long-established policy."

Contracting Officers May Approve and Authorize the Inclusion of Partial Payment Clauses in Subcontracts.

Contracting officers who have the authority to negotiate procurement contracts of "any type" and with any provisions not prohibited by law or regulation, clearly have the power to limit the extent, terms and source of subcontracting by prime contractors and to prescribe on what terms and conditions—not prohibited by law or regulation—such subcontracts shall be made. No contention made by Appellants warrants any contrary conclusion.

Likewise, the suggestion that the provision vesting title in the United States Government under the partial payment clause in the subcontract is ineffective because there is no privity of contract with the Government is a non sequitur and is equally unsupportable.

It is elementary that parties who are not in privity of contract, nevertheless, may be vested with valuable property interests and enforceable rights thereunder. Williston on Contracts, Revised Edition, Vol. 2; Sec. 347.

This rule is particularly applicable here, where defense materials are being made for the United States Government for use in the exercise of its sovereign power, according to its special and classified specifications, under a prime contract which permits of subcontracts, only if approved by the Government and upon terms satisfactory to it. The Government—though not in strict privity of contract—is no stranger to this transaction.

An essential adjunct to the power to negotiate and control prime contracts is the right to **approve** and where necessary to protect the interests of the Government to **supervise** subcontracts. This is recognized by the Letter Contracts[24] entered into between the Government and the prime contractors wherein it is provided that all subcontracts, in furtherance of performance of the prime contracts, which exceed 5% of the prime contract or $25,000, whichever is less, "will be subject to the written approval of the Contracting Officer". (Kaiser prime contract, par. 5 (145) and Wright prime contract, par 5. (192)).

The products produced by the prime contractor and the subcontractors will culminate in one end product for the Government for defense purposes. It is therefore necessary and proper that the Government through the Air Force Contracting Officers have the right to approve, supervise and control not only the prime contractor but the subcontractors as well.

With the required approval of the contracting officer, the parties, following long-established procurement procedure, included in their respective contracts a partial payments clause with a provision for vesting of title in the Government. Partial payments from the prime contractor to Murray, the subcontractor, are reimbursed to the prime contractor by the Government.[25] No statute, regulation or judicial decision precludes the making of such a subcontract with title vesting directly in the Government to goods made for the requirement and ultimate use of the Government, even though the Government is not in strict privity of contract with or directly liable to the subcontractor.[26]

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[24] In each of the subcontracts and each of the amendments thereto it was expressly provided that said **subcontracts and amendments thereto were entered into and "approved under the provisions of such prime contract."** (See Exhibit 2A, (169 and 172); Exhibit 2B, (173, 178 and 179); Exhibit 2C, (183); Exhibit 5A, (216 and 221); Exhibit 5B, (223)).

[25] See Air Materiel Command, Directorate Office Instruction No. 70-83 (Procurement and Industrial Planning) Paragraph 4 (e). Exhibit No. 6, (226).

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[26] That Congress recognized the validity of such a title vesting clause under a subcontract is further indicated by reference to 40 U.S.C.A. 472 (k), which is a Surplus Property Disposal Act enacted in June of 1949 and amended in September, 1950, prior to the date of the Murray subcontracts in question, which section provides, among other things—

> "(k) The term 'contractor inventory' means (1) **any property acquired by and in the possession of** a contractor or **subcontractor under a contract pursuant to the terms of which title is vested in the Government . . .**"

III.

Was the Title Vested in the United States Pursuant to the Partial Payment-Title Vesting Clause absolute and complete and not Bare Legal Title or a Lien for Security?

The Lower Court Answered "Yes."

Appellee Contends the Answer Should be "Yes."

In respect to the partial payment clause here in question counsel for Appellants City of Detroit and County of Wayne contend that:

> (a) "Appellee retained all of the incidents of ownership in the property, while the Government received only a security or paper title for financing advanced to appellee." (Appellants' Brief, page 53)
>
> (b) "The legal title theory is the creation of Government lawyers, blandly over-reaching their procurement powers as limited by Congress;" (Appellants' Brief, page 36)
>
> (c) "Attempts to explain the actions of the procurement officers lead to just one conclusion: that partial payment provisions were an afterthought and an overreaching on their part." (Appellants' Brief, page 43)
>
> (d) " 'A lawyer's ingenuity devised a technically elegant arrangement'*** (the partial payment-title vesting clause) which did not change the true nature of the transaction " (Appellants' Brief, page 75)

(e) "The traditional immunity of the Federal Government and its property should be distinguished from attempts to create immunity[27] by ingenious contract words having no substantial relation to the protection of the sovereign from hostile action of the States but devised mostly for the Government's or a contractor's specific economic benefit." (Appellants' Brief, page 26)

The partial payment-title vesting clause is hardly an after thought" or "the creation of Government lawyers, landly over-reaching their procurement powers." The partial ayment-title vesting clause, such as here in question, is a tandard, long-established (for over seventy years) and wide- y used clause in United States Government procurement con- racts (See 18 Opinions Atty. Gen. (U.S.) 105 (1885)). This

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[27] The suggestion of Appellants that the partial payment-title esting clauses are "attempts to create immunity by ingenious ontract words" is directly contrary to their express stipulation that—

"In the negotiation of the respective prime contracts between the United States Air Force, Kaiser and Wright, the negotiating parties did not consider the possible avoidance of City and County ad valorem and personal property taxes as an element in their decision as to whether or not the standard partial payment clause (referred to in procurement regulations) should be inserted in these contracts." Stipulation No. 2, Par. (1) (R. 86).

Even if avoidance of ultimate payment of State or local tax was the purpose, it is not here determinative. *Kern-Limerick*, 347 U.S. 110, 116.

Court and other Courts, with but a single exception,[28] have held that these partial payment-title vesting clauses effectively vested title and beneficial ownership to the material and work in process in the United States Government—as distinguished from mere security or lien title—and that the property so owned was immune from State ad valorem taxation or liens created by State law.

United States v. *Ansonia Brass and Copper Co.*, 218 U.S. 452, 466-472 (1910)

In *re Read-York, Inc.*, 152 F (2d), 313, 316-7 (1945)

Douglas Aircraft Co. v. *Byram County Tax Collector*, 57 Cal. App. (2d) 311; 134 Pac. (2d) 15 (1943)

Craig, State Tax Collector v. *Ingalls Ship Building Corp.*, 192 Miss. 254, 5 So. (2d) 676

Superior Shipbuilding Co. v. *Beckley*, 175 Wis. 337, 185 NW 199

See *Wright Aeronautical Corp.* v. *Glander*, 151 Ohio 29, 84 NE (2d) 483 (1949)

See *Kern-Limerick, Inc.*, supra, and *U.S.* v. *Allegheny County, supra*

See also, In re *American Boiler Works*, 220 F (2d) 319, 321 (1955)

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[28] The only exception is *American Motors Corp* v. *City of Kenosha*, 274 Wis. 315, 80 NW (2d) 363, discussed at p. 74, infra, which fails to even mention or discuss *Superior Shipbuilding Co.* v. *Beckley*, 175 Wis. 337, 185 NW 199, supra, which is directly contrary to its holding in American Motors.

United States v. *Lennox Metal Manufacturing Co.*, 225 F. (2d) 302, cited by Appellant, does not stand for the proposition asserted by Appellant but merely holds that where the Government terminates a contract for an alleged default on the part of the contractor, and such alleged default is caused by the Government's wrongful and arbitrary refusal to make partial payments as agreed, a Court of equity will not permit the wrongdoer to benefit by his own wrong and to capture goods in process upon such wrongful termination. The decision does not turn upon the issue of whether or not a partial payment-title vesting clause creates absolute title or merely a security or lien title. Cf. *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452; *In re Read-York*, 152 F(2d) 313, and other partial payment clause cases cited hereinabove.

he decision of this Court in *United States* v. *Ansonia*
ss and Copper Company, 218 U.S. 452 (1910) is the pri-
y and controlling authority for virtually all of the above
es.

n the *Ansonia* case this Court in unequivocal language
ed the cardinal rule relative to the construction and
icial determination of the effect of contracts containing
tial payment-title vesting clauses such as here involved,
ing—

> " . . . it is well settled that if the **contract** is such as to **clearly express the intention of the parties that the builder shall sell and the purchaser shall buy** the ship **before its completion,** and at the different stages of its **progress,** and this purpose is expressed in the words of the contract, it is **binding** and **effectual** in law to **pass the title."** *U. S.* v. *Ansonia Brass & Copper Co.,* 218 U.S. 452, 467.

So, too, in the case at bar, the parties to the contract—to
ich Appellants were not parties—clearly and unmistakably
pressed their intention that title should vest in the United
ates and,

> "that the builder shall **sell** and the purchaser shall **buy** . . . **before its completion** and at different **stages of its progress** . . ."

The partial payment clauses in each of the subcontracts in
e case at bar express the intention of the parties that upon
ceipt by Murray of—

> "partial payments . . . prior to delivery, on **work in progress for the Government** under this contract . . .
>
> (b) . . . **title** to all parts, material, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, **shall forthwith vest in the Government;** and **title** to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid **shall vest in the Government forthwith** upon said acquisition or production . . ."

The express language certainly carries no suggestion of an intention by the parties to pass anything less than absolute and beneficial ownership to the United States.

As the District Court said (R. 121):

> "A type of contract whose ultimate purpose is specification manufacturing for a purchaser under which title is to pass before delivery, but after partial payment, appears to this Court to be a far cry from any customary lien or security situation . . .
>
> "It was intended by the parties that plaintiff was to manufacture certain sub-assemblies according to specification which would become the property of the purchaser, United States. The fact of future delivery is not determinative of ownership. The fact of contractual agreement is—such agreement stipulating the time for passage of title. Why should plain, unambiguous language be distorted so as to convert a legal title holder to a lien or because persons not party to the contract contend that title passed prematurely?"

In the instant case Murray had contracted with certain Government prime contractors—with the required approval of the Government—to manufacture aircraft subassemblies to be paid for by the Government, for use by the Air Force of the United States and to be fully and completely owned by it in every sense of the word ownership.

Partial payments were payments on account of the purchase price. The contractor received such payments for work done. The amount so received was not a loan or debt which contractor was obliged to repay. There was no debt—no obligation—title was not security title, since there was no obligation to secure. Compare advance payments, which are loans, where interest is paid and security and lien are required to secure such obligation.

Appellants, in support of their erroneous contention that the Government did not acquire absolute title to the property here involved, attempt to construe partial (progress) payments as mere advancements. However, this attempt is negated by the Armed Services Procurement Regulations upon which Appellants purportedly rely. These regulations specifically distinguished partial payments from advancements.

> "**Advance payments are** considered as **loans** to the contractor prior to and in anticipation of complete performance of a contract. **Advance payments are thus distinguished from 'partial payments' and** 'progress payments' **made because of performance or partial performance of a** contract." 1 *CCH Gov't Contracts Rep.*, Para. 10,411.

See discussion supra, pages 49-52.

The claim that the partial payments made to Murray were in the nature of a loan giving rise to a lien is patently erroneous.

The *Ansonia* case carefully and clearly distinguished between procurement contracts which provided for the vesting of title in the Federal Government under partial payment provisions, and those which merely gave the Federal Government a lien. In that case this Court had before it both types of clauses. In connection with the contract for the construction of the vessel "Benyuard" wherein partial payments with vesting of title was provided it was held that **title** and ownership vested in the United States absolutely free from seizure or encumbrance by the laws of a state sovereign, as distinguished from the rule to the contrary in case of the vessels "Mohawk" and "Galveston" where the procurement contract only provided for a **lien.**

In enacting the Armed Services Procurement Act of 1947 Congress was aware of the difference between advance payments with lien provisions, the use of which was expressly limited, and provisions for partial payments as the work progressed with title and absolute ownership vesting in the Government, which had long been in use and which were not by such Act limited or prohibited. The procurement branches of the **Air Force knew the legal effect of and difference** between title vesting partial payment clauses such as those here in question, and provisions for lien under advance payment provisions.

None of the elements of a mortgage or mere security transaction is here present. The Government intended to acquire absolute ownership and beneficial use of the defense materials manufactured by Murray. It is plain that title was not taken by the Government to secure the performance of any obligation by Murray.

Under The Title Vesting Provision of the Partial Payment Clause the Federal Government can maintain Control of Defense Material in Process until Delivery, so Essential to its Governmental Functioning—which Does not Obtain if it Merely has a Lien for Security.

It is of the utmost importance to the defense agencies of the United States Government, who are charged with the duty of preparing adequate military aircraft and implements of war for purposes of National Defense, that the Government at all times—even during the process of manufacture—have complete and absolute control and ownership of essential, basic and critical war material. This is one of the reasons why the title vesting provisions in partial payment clauses appear in eighty per cent (80%) of the Procurement Contracts of the United States Air Force.[29]

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[29] Compare *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, where the Federal Government as seller of real estate retained only a vendor's lien but had and retained no beneficial interest or "sovereignty in the United States" (pp. 563-4). *S.R.A.* and *Hines Lumber Co.*, 248 P (2d) 720, primarily relied upon by Appellants are inapposite for this reason, among others. Absolute title and beneficial ownership are in the Federal Government under the standard form of partial payment-title vesting clauses in the case at bar. As is pointed out, infra, page 98, the City and County cannot destroy the constitutional immunity of this government-owned property, by attempting to assess it to Murray on the basis (nowhere provided by State law)—That the tax is "subject to prior rights of the Federal government."

ppellants can now hardly be heard to the contrary in
v of their express stipulation that—

> "The actual factors which the parties considered in arriving at a determination to include such partial payment clauses were the needs of the contractor for partial payments as the work progressed in view of the period of time involved in the performance of each contract, together with the desire of the Air Force to maintain control of material and work in process during the life of the contract so that such material could be moved elsewhere in the event of nonperformance." Stipulation No. 2, Par. (1) (R. 86)

t is most important that absolute ownership and control
vested in the Government during all stages of manufacture.

> "The language of the article is designed to protect the rights of the government. After all, this is a contract made by an agency charged with the national defense and it is quite understandable that prompt and decisive action is required when a contractor is unable to carry out his agreements." *In re American Boiler Works*, 220 F (2d) 319, 321.

is important to the Government that it have such owner-
ip and control so that it can divert raw material or work in
ocess to another Defense Contractor where the supply of
ch material is short, so as to expedite fulfillment of an
erall Procurement Program, as was done in the instant case
a few isolated instances at the direction of the Government
See Stipulation 4, par. (10) (R. 98)).

It is important that the Government have the ownership
id control of such material if there be a strike at the plant
the contractor or subcontractor and the materials must be
oved elsewhere, or the contractor or subcontractor becomes
volved in financial difficulties and his goods are otherwise
ibject to attack of creditors, or subject to labor liens (see
re *Read-York*, and *In re American Boiler Works*, supra).

The aircraft parts in question are for defense purposes and
re specially designed under specifications many of which are

secret. Therefore, the Government does not wish to have such materials in process subject to the use of the contractor or subcontractor for his own purposes or subject to attack, sale and use by his creditors.

> "We are now treating of property which the United States owns. **Such property,** for the most obvious reasons of public policy, **cannot be seized by** authority of **another sovereignty** against the consent of the Government. The **Benyuard,** as fast as constructed, **became one of the instrumentalities of the Government, intended for public use,** and could not be seized under state laws . . ." *U. S.* v. *Ansonia Brass* 218 U.S. 452, 471.

> "It would be intolerable to imagine that the United States would not have the right at all times and under all circumstances to the possession of such materials 'purchased *** to promote the defense of the United States.'" *In re American Boiler Works,* 123 Fed. Supp. 352, 354.

None of these safeguards can be assured to the United States or obtained if the title-vesting clause is deemed only to be one of lien or security title. Clearly it was intended by the Government that full and complete ownership of the materials in question be fully reposed in it.

Government ownership of property acquired by virtue of partial payments upon the purchase price is not denied or affected by regulations as to control of Government property.

Appellants contend that the Government did not consider itself as "really owning" the property here in question (Appellants' Brief, page 75), and attempt to misconstrue the regulation entitled "Manual for Control of Government Property" (1A *CCH Gov't Contracts Rep.,* Para. 29,754) in support of such contention.

The regulation referred to is limited in its application and scope and states that **"as used in this manual"** (Para. 29,754) property title to which is vested in the Government as a result of partial payments **"shall not for purposes of this section** be classified as Government property" (Para. 29,754) (104.2). This is not a denial of Government ownership of property upon which partial payments have been made but rather is a definition for administrative purposes of different classes of Government-owned property. Said regulation was accordingly expressly limited to a particular classification so that it would not have general application for all purposes.

Paragraph 205.5 of said Manual for Control of Government Property (1A *CCH Gov't Contracts Rep.*, Para. 29,757), which is not quoted in Appellants' Brief, refutes any contention that the provisions of said Manual were intended to or could operate to deny the Government's ownership of property acquired by the making of partial payments upon the purchase price.

> "Advance, **progress** or **partial payments**—pursuant to the terms of a contract **the Government may acquire title** to property upon the making of advance, **progress or partial payments** to the contractor. **Property** to which the **Government has acquired** a lien or **title** solely **as a result of partial,** advance or progress **payments shall not be subject to the provisions of this manual."**

The property covered by this Manual is machinery, durable machine tools and other such property which by its character is not consumed in the manufacture of the final end product in the course of performance of the contract, as are materials and supplies used in the process of manufacture covered by the partial payment-title vesting clauses. This type of property may be furnished by the Government[30] under a Facilities Contract or may in some instances be acquired by the contractor. Property of this character does not lose its original form and character in the performance of the contract and may be used time and time again in the performance of other contracts. Thus it is a simple matter for the Government to control said property without reliance upon the contractor's records. As to inventory and supplies used in manufacture, control by the Government at each stage of the manufacturing process is impracticable and, therefore, the Government looks to the contractor for accountability and risk until the product is manufactured.

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[30] Accordingly, the prime and subcontract provisions referred to by Appellants (Appellants' Brief, page 74) dealing with "Liability for **Government-furnished** Property" are expressly made inapplicable to property to which the Government shall have acquired title by virtue of partial payments on the purchase price.

Clearly, by its express language, the aforementioned Manual for Control of Government Property has no application to the instant case and does not purport to deny the Government's absolute ownership of property acquired by virtue of making partial payments upon the purchase price. The express and unequivocal language of the title vesting provision of the Murray subcontracts is not affected by the aforementioned regulation.

The foregoing also explains why risk of loss during process of manufacture was by agreement placed upon the manufacturer and why it carried insurance.

None of the contract provisions or procurement regulations are inconsistent with the vesting of legal and beneficial ownership in the United States Government.

Risk of Loss and Insurance

Appellants' contention (Appellants' Brief, pages 58-61) that because the parties contracted that Murray should bear the risk of loss to the Government-owned property Murray should thus be regarded as the owner thereof is a non-sequitur. It is not uncommon for a seller to assume the risk of property in his possession even though title thereto has passed to the buyer. When the seller assumes the risk of loss of property, title to which has passed to the buyer, "he thereby virtually becomes an insurer of goods which he does not own" (Williston on Sales, Sec. 302, Rev. Ed.). Accordingly, it was incumbent upon Murray to protect itself against possible loss by insuring the property of the Government in its possession.

The policies of insurance held by Murray took cognizance f the Government's ownership of certain property in Mur-ay's possession, and covered the following:

> "All real and **personal property** of the insured, including manuscripts, mechanical drawings, tools, dies, jigs, and patterns, their own, or held by them in trust or on commission, or on consignment, **or sold but not delivered or removed, or for which they are liable,** all while located in and/or on the premises occupied by the insured." (Stipulation No. 1(83))

Appellants' statement that—

> " * * * if destruction of the property caused appellee not to perform its obligation, the Government would not be entitled to reimbursement for the value of the property destroyed but merely to recover its money paid out in the form of partial payments." (page 59)

is patently incorrect and contrary to the express terms of the contract clause upon which they attempt to found their argument.

The subcontract here involved states:

> " * * * The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage **to property to which title vests in the Government** under the provisions hereof." (R. 177)

There is no statement or intendment that Murray's liability to the Government would be limited to the partial payments received by Murray in the event of loss or destruction of the property. The parties recognized that the property was owned by the Government and Murray was responsible for such property. If the property had been destroyed Murray would be obligated to pay to the Government the **total value of the property** less any unpaid portion of the sales price owing to it by the Government.

An insurable interest in property does not require or imply any property interest or beneficial ownership in the property. It is sufficient that the insured be so situated with reference to the property that he would be liable to pecuniary loss should the property be destroyed (29 Am. Jur., p. 294, Sec. 322. See also 29 Am. Jur., p. 296, Sec. 325).

The statement of the Wisconsin Supreme Court in *American Motors Corp.* v. *City of Kenosha,* 274 Wis. 315, 80 N.W. (2d) 363 to the effect that who assumes the risk of loss must be construed as possessing an "element of ownership,"[31] relied upon by Appellants, is not in accord with the law of sales, property or insurance and is contrary to the clear expressed intent of the parties. It may be observed that the Wisconsin Court in *American Motors* did not discuss or even refer to its previous decision to the contrary in *Superior Shipbuilding Co.* v. *Beckley,* 175 Wis. 337 (1921), 185 N.W. 199, supra where it held, relying upon the *Ansonia* case, that vessels and materials therefor in the process of construction for the United States were immune from state taxation because title had passed to the Government pursuant to a partial payment-title vesting clause. The Court there held that—

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[31] In *American Motors* the Court recognized that the question as to whether or not title was vested in the United States Government pursuant to the partial payment-title vesting clause was a question of Federal law and conceded that title was vested in the United States. The Court, however, sought to escape the admitted controlling authority of *Allegheny* by saying that "title and ownership are two different things" and "the question of ownership for tax purposes is one of local law." Such reasoning is contrary to *U. S.* v. *Allegheny County,* 322 U. S. 174, *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, and *Society for Savings in the City of Cleveland* v. *Tax Commr. of Ohio,* 349 U.S. 143. Federal immunity naturally is dependent upon Government ownership and this question is one of Federal law not controlled by the law of any state.

The Wisconsin Supreme Court, 80 NW (2d) 363, at 367, states that it was "not satisfied" that the United States Court of Appeals in the case at bar (The *Murray* case) considered provisions of the contract which bear upon ownership as contrasted with mere security or lien title. A reading of the opinion of the United States Court of Appeals (R. 271) citing *Ansonia,* distinguishing *S.R.A.* and a checking of the briefs of the parties filed in the Court below (wherein the contract provisions and the other arguments now presented and discussed in the Wisconsin opinion, were discussed at length) irrefutably negates the suggestion of the Wisconsin Court. Furthermore, it is significant that the Wisconsin Court completely overlooked or failed to meet the controlling decision in *Ansonia* dealing with title and ownership as contrasted with mere lien or security title.

> "The fact that the contract contained other clauses relating to insurance, the duty of the Company to restore the property in case of destruction by fire and the payment of valid taxes, if any, **does not operate to modify the clear intent of the parties as expressed in the language of the contract** relating to the time when title shall pass." (185 N.W. 199, 201)

The fact that Murray contracted to accept responsibility for loss or destruction of Government-owned property in its possession and sought to protect itself against possible pecuniary loss through the use of insurance does negate the express intent of the parties that title—and beneficial ownership—should pass to the purchaser and ultimate user, the United States Government upon receipt of a partial payment upon the purchase price as the work progresses.

Authority to acquire or dispose of property "at option of Government" and "upon terms approved by the Contracting Officer."

Appellants' argument (Appellants' Brief, page 61) that because the subcontracts here involved permitted Murray to acquire or dispose of Government property in its custody and possession, upon certain conditions, Murray was the beneficial owner thereof is erroneous. The language of the contract states that—

> "The Contractor, either before or after receipt of notice of termination **at the option of the Government,** may acquire or dispose of property **title to which is vested in the Government** under the Article, **upon terms approved by the Contracting Officer.**" (Exhibit No. 2B, par. 11 (d) (R. 176))

The above clause recognizes the ownership of the Government and permits the contractor to acquire or dispose of the property only "at the option of the Government" and then only "upon terms approved by the Contracting Officer." In addition, the agreed price or proceeds for any acquisition or disposition of such property by the Contractor must be paid or credited to the Government as directed by the Contracting Officer (Exhibit No. 2B, par. 11 (d) (R.176)).

The extensive control exercised by the Government over the property acquired or produced under the contracts here involved is more than a mere "supervision of the bockkeeping" of Murray.[32] (Appellants' Brief, page 62). The Wisconsin Court and Appellants' contention in this respect ignores the self-evident purpose of the partial payment-title vesting clause and the importance of Government control over vital defense materials.

The United States Air Force was interested in procuring aircraft and component parts therefor for the national defense and to that end entered into prime contracts with Kaiser and Wright (Exhibit No. 1 (R. 140-168) and Exhibit No. 4 (R. 189-215)) for the manufacture of such aircraft, reserving the right to control the terms and extent of subcontracts entered into by the prime contractors. The sole aim and purpose of the United States Air Force was to acquire aircraft and to control the production thereof and materials incident thereto at all times.

Disposal of Scrap

Contrary to Appellants' claim (Appellants' Brief p. 63) the fact that Murray, by contract, was empowered to sell current production scrap without approval of the Contracting

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[32] While the Government did take certain steps to check Murray's costs See Stipulation No. 2, par. 4(a), (b), (c) and (d) (R. 86) to effect a clearance for the prime contractor, there is no basis for the contention that the Government was primarily engaged in the banking or loan business rather than the maintenance of the national defense and the control of the materials and property essential thereto.

Officer, provided that the proceeds therefrom were paid or credited to the United States Government, is certainly not inconsistent with the vesting of title and beneficial ownership in the United States.

Upon receipt of partial payment, title to all material and work in process was vested in the United States. When scrap was generated in the course of current production, Murray did not thereupon become the owner of such scrap. When Murray sold the scrap (for convenience of handling) at the site of the manufacturing operation, the proceeds (of this Government property) were "paid or credited to the Government as the Contracting Officer shall direct"—which is consistent with Government ownership. Otherwise, Murray could have retained the scrap for itself or retained the proceeds of the sale.

Neither was it inconsistent with Government ownership that (a) Murray was the sole judge of what materials (it was manufacturing) were defective and should be scrapped—since Murray was primarily responsible for this manufacturing operation, or (b) Murray found the customer and agreed on a price—since Murray implicitly owed a duty of good faith for and on account of the Government.

The fact that materials belonging to the Government were thus scrapped for and on the account of the Government is not inconsistent with Government title and ownership.

The Vesting of Excess or Residual Materials (for which Government does not ultimately pay) after Completion of Deliveries or Liquidation of Partial Payments.

Appellants contend (Appellants' Brief, p. 64) that the provisions of 11 (d) of the contract (Exhibit No. 2B, par. 11 (d) (R. 176)) to the effect that "upon completion of deliveries" or "upon liquidation of partial payments" title to any materials remaining shall vest in Murray, is evidence of mere security title in the Government. This contention als is without merit.

The underlying reason for the Government's including i the partial payment-title vesting clause a provision fo vesting of title in the contractor such as subparagraph (d) o paragraph 11 of the Murray letter subcontracts (R. 176 was to facilitate the disposition or storage of residual tools supplies and materials, suitable primarily for this particula job and of little or no value to the Government, where th problem and costs of storage, housing or sale would probabl exceed the value. Furthermore, the contractor or subcontractor ultimately would only be paid for the completed unit an not for excess or residual materials or supplies. The reaso for the clause is set forth in 10 Code of Federal Regulations 1945 Supp., Paragraph 803.331-A as follows:

> "Any contract which contains a partial payments article similar to that set forth in either Paragraph 803.33 or 803.331 but not containing the substance of subparagraph (d) of such article may be amended to include th substance of such subparagraph (d) in such partia payments article. **The addition of such paragraph is considered to be of advantage to the Government as simplifyin and expediting the transfer and disposition of property acquired for or used in the performance of a contract and it ha been determined that the making of such amendments wi facilitate the prosecution of the war.** Authority is granted t the chief of each technical service to make or to authoriz the making of such amendment pursuant to the Firs War Powers Act and Executive Order No. 9001."

It is to be noted that, **"upon completion of deliveries"** unde the contract, unlike in lien or chattel mortgage situations, title in and to the completed end product continue throughout and remains vested in the United States, th purchaser, for its use for defense purposes. Only the exces or residual material not embodied in the end product vest in Murray. In a chattel mortgage situation, all of the property securing a debt, is discharged from the mortgage or lien, and the mortgagee never gets title to any part thereof—except on foreclosure. Since the Government only pays a fixed price for the end product, it, in effect, never ultimately pays for the excess or residual material left over, for which it has no use and which has little or no value.

The revesting provision, subparagraph 11(d) of the Murray subcontracts—considered on its face, in the light of its purpose set forth in the Regulations, and as interpreted by this Court in the *Ansonia* case, supra, cannot be construed as being in any way inconsistent with the vesting of title in the Government in accordance with the express provisions of the contracts. In *United States* v. *Ansonia Brass*, 218 U.S. 452, an argument comparable to that now urged by the City was rejected. There it was contended that a clause which permitted the United States Government to reject the completed vessel and return it to the contractor was inconsistent with the express provision vesting title to the vessel in the Government during various stages of completion upon the making of a partial payment. In rejecting this contention, the Court said, at page 468:

> "Let it be conceded that **this section gave the Government the right to reject defective work or material, or even the entire dredge, if,** upon trial and before final acceptance, **it proved defective—is that right inconsistent with the vesting of title in the parts as paid for,** as specifically provided in section 211? **We think not.** It may be that in such contingency the Government might reject the dredge. This might be true consistently with the acquirement of title in parts accepted and paid for after inspection. That is, if the whole, upon final trial, proved defective, all, including the restoration of that acquired, might be within the power of the Government."

Appellants erroneously contend that this subparagraph (d) in the partial payment clause does not serve a purpose "to secure control" (Appellants' Brief, page 64). This is not so since under this clause title to all property is vested in the United States throughout the manufacturing process

until "completion of deliveries" and thus control in the G
ernment obtains throughout until it receives the end produ
covered by the contract. Only excess or residual materials
no use or value to the Government vest in the contrac
after completion. At this point control is no longer requi
or indicated.

The situation as to the **"liquidation of the partial paymen**
–the alternate provision in subparagraph (d) relating
vesting of residual materials in the contractor–in practi
operation and effect is not different from the foregoing.

The statement of the Appellants (Appellants' Brief, p
65) that a "practical operation" of the revesting provisio
demonstrated by a situation where 25% of the contract p
is the partial payment received and goods equivalent the
are delivered to the Government is completely theoreti
Such a situation does not and will not obtain in the da
day practical and actual operation of the partial paym
clause in practice. Appellants assume a situation wh
notwithstanding a provision in the partial payments cl
for partial payments not to exceed 90% of the cost,[33] or 7
of all costs,[33] the contractor will not receive such payme
but payments considerably less than that–to wit only 2

Since the performance of defense contracts of the cha
ter at bar involve the expenditure of large amounts and
completion of the contract is necessarily spread over a
period of time, in practical operation, the contractor–ha
the right so to do under the partial payment clause–t
down virtually as much of the purchase price as the cl
permits (90% in Kaiser & 75% in Wright of costs expen
as the work progresses, rather than strain its own resou
which is neither warranted nor expected. For Appellan

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[33] 90% in the Kaiser subcontract (R. 175).

75% in the Wright subcontract (R. 219).

suggest that "in practical operation," the contractor would take down only 25% of costs expended or of the contract price is to ignore the realities of practical business operations. In the case at bar, it is undisputed that—

> " . . . as of June 30, 1953, Murray had incurred costs in the performance of said two subcontracts from the inception thereof in the aggregate amount of $16,264,771.03 against which it had received payments covering its costs aggregating $14,940,516.80, exclusive of Murray's profits on completed and delivered property."[34]

(Affidavit of Mark I. Sammon, paragraph 9, (R. 52))

This demonstrates how defense contractors are impelled by sound business practice and necessity to utilize virtually to the fullest extent their right to obtain partial payments upon the purchase price as the work progresses.

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[34] "Of said payments of $14,940,516.80 received, $12,550,191.94 represented cost of property exclusive of Murray's profit on billings for completed and delivered products and $2,390,324.86 represented partial payments on account of work in process, not yet completed or delivered. Of the $12,550,191.94, $10,771,040.31 had originally been paid to Murray in the form of partial payments as the work progressed and the balance of $1,779,151.63 was paid from time to time as the final invoices were rendered for the completed and delivered product. This $1,779,151.63 represented the hold-back amounts (over and above said partial payments previously made) which could not be billed until completion and delivery.

"Of said aggregate costs of $16,264,771.03, as of June 30, 1953, there remained at Murray in process and uncompleted work upon which Murray had incurred costs aggregating $3,714,579.09 ($16,264,771.03, total costs, less billings of $12,550,191.94 for cost of completed and delivered products exclusive of Murray's profit) and upon which Murray had theretofore received partial payments as the work progressed in the sum of $2,390,324.86. Of the unpaid portion of Murray's costs amounting to $1,324,254.23 on such in process and uncompleted work, as of June 30, 1953 Murray had previously requested, but had not yet received, partial payments in the amount of $420,766.10."

(Affidavit of Mark I. Sammon, paragraph 9, (R. 53)).

There is no provision for repayment of the partial payments by the contractor, under the partial payment clause o under any other clause in the contract—nor was such repayment intended or contemplated. The partial payments wer upon the purchase price; they were not loans where repayment was indicated. The only way in which partial payment may be "liquidated" is by delivery of completed end products.[35] Thus, with such large percentage of costs covered b partial payments, it is most unlikely that in practice, th partial payments would be completely liquidated until "completion of deliveries." This factor is ignored by Appellants Appellants erroneously assume that in liquidating partia payments the entire amounts of the delivered price are firs offset against any outstanding partial payments, which assumption is contrary to the provisions in the contract that—

> "(c) In making payment for supplies furnished hereunder, there shall be deducted from the contract pric therefor the proportionate amount of the partial payments theretofore made to the contractor, under th authority herein contained." (R. 175)

(See also Air Force Procurement Instruction 54-609, reported in CCH, Government Contract Reporter, paragrap 26714.9.)

Contrary to the intimation of Appellants (Appellant Brief, page 65) *United States* v. *Lennox* does not conside the effect of "liquidation of partial payment" by delivery o otherwise. Furthermore, in connection with the case o *United States* v. *Lennox*, it should be noted that Judg Frank's comments* (relied upon by Appellants, Appellants

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[35] Of course, if the contract is terminated by the Government f its convenience, the entire contract is settled at that time unde general termination regulations, after crediting to the Government the amount of partial payments theretofore paid upon th purchase price (R.186, par. (d)).

*Judge Frank's comments appear in a separate opinion. Th majority of the Court "decide this case [Lennox] solely on anothe ground" and therefore did not join in his opinion (p. 317).

Brief, pages 66-7) about an alleged "skillful trap" set for an "unwary" contractor, pursuant to the title vesting to thousands of dollars worth of property in the event of a partial payment of only $50.00, does not recognize the fact that had the Government obtained possession of the thousands of dollars worth of property, it would have been required to pay the value of the property taken. The transfer of title to the Government does not preclude the necessity for further payments pursuant to the terms of the contract. This is clearly indicated in that part of the partial payment clause which states:

> "Provided, that nothing herein shall deprive the contractor of any further partial or final payments due or to become due hereunder; or relieve the contractor or the Government of any of their respective rights or obligations under the contract."[36]

It is to be noted that in *American Boiler Works,* 220 Fed. (2d) 319, supra, it was held that title vested in the United States by virtue of title vesting language in the contract even without any provision for partial or progress payments.

The vesting provision, subparagraph 11 (d) of the Murray subcontracts—considered on its face, in the light of its purpose set forth in the Regulations, and as interpreted by the United States Supreme Court in the *Ansonia* case, supra,—cannot be construed as being in any way inconsistent with the vesting of title in the Government ~~in accordance~~ with the express provisions of the contracts.

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[36] As was pointed out hereinbefore, page 63, footnote 28, *United States* v. *Lennox* in effect only held that the Government in default (failing to make partial payments as required) cannot benefit by such default and terminate a contract for default brought about by its own failure.

The conduct of Murray and the prime contractors was not inconsistent with the express intention to vest absolute title and ownership in the Government and could not divest the Government of such title.

The contention of Appellants (Appellants' Brief, page 65 et seq.) that Murray followed a course of conduct, in dealing with the assessed property, inconsistent with the claim that absolute title vested in the United States is without foundation.

At the outset it should be noted that it would be a strange doctrine indeed which would permit a person dealing with Government property to divest the Government of ownership of that property by his action or course of conduct. In the case at bar, title vested in the Government by virtue of the express and unambiguous language in the contract and no action of Murray could divest the Government of such ownership or create an estoppel against it.

Appellants argue (Appellants' Brief, page 67) that possession and control, retained in actual practice by Appellee while the work was in process, is persuasive that the Government did not acquire a full, beneficial title. The same argument was made and was unequivocally rejected in *United States of America* v. *County of Allegheny*, 322 U.S. 174, 181-2.

The contention that title did not pass because "no notice was given to creditors of Appellee of the partial payment and transfer of title clauses (Point 1, Appellants' Brief, page 69) is clearly erroneous. A similar argument was urged and rejected in the *Allegheny* case (p. 182). Title was vested in the United States Government under a federal procurement statute and the Federal law governs notwithstanding any rule to the contrary which may be asserted under state law.

The fact that no written document or bill of sale transferring title to the property in question was executed and delivered by plaintiff to the Government following request for a receipt of the partial payment (Appellants' Brief, page 69 point 2) has no bearing on this question whatsoever. Provision for the vesting of title in the United States Government is contained in the partial payment clause, and no further document transferring title is required.

The fact that the completed tools made by plaintiff under the subcontract were merely inspected, but possession thereof was retained by Murray for performance of the subcontract, (Appellants' Brief, page 69, point 3) is no authority for the proposition that title to such tools did not vest in the United States.[37]

The fact that no change was made by plaintiff in its accounting procedure after receipt of the partial payments from that which obtained before the partial payments (Appellants' Brief, page 69, point 4) and the fact that plaintiff made no change in its physical treatment of the property assessed after receipt of the partial payment, from that which obtained before (Appellants' Brief, page 70, point 6) is no support for the proposition that Murray did not consider that title vested in the Government after receipt of the initial partial payment. Since Murray intended from the very beginning to obtain partial payments under its subcontracts, it set up its own internal accounting entries and procedures from the very beginning as though partial payments had in effect been made, treating the ownership of all materials and work in process as being in the Government and the amounts due under the contracts from the Government as amounts recoverable from the Government (Stipulation No. 4, Par. 7, (R. 96)). Likewise, from the outset, it is clear that Murray's aircraft operations were at all times entirely separated from its automotive and other type of operations and that from the very outset all of these defense materials were tagged, labeled and segregated by subcontract number, bearing code references to each subcontract. Therefore, no action or treatment of any different nature in the handling or segregation of this defense material was necessary after receipt of partial payments by Murray than obtained before receipt of such partial payments (See Stipulation No. 4, Par. 8 (R. 97-8)). The property was treated from the very outset as Government owned.

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[37] These tools in Murray's possession on January 1, 1952, the assessment date, were **recognized** and treated **by** the **City** and **County** as **belonging to the United States** and were not assessed to Murray (Stipulation 1, Par. (4) (b) (R. 82)). It is, therefore, strange indeed that Appellants should now argue that Murray's retention of possession of such tools was inconsistent with title thereto being vested in the United States.

The contention that Murray's published Annual Report in 1951 to its stockholders and to the public—as distinguished from its internal records and operations referred to immediately hereinbefore—did not make reference to the sum of $125,000.00 as a segregated item of accounts receivable under the subcontract in question (Appellants' Brief, page 69, point 5) did not indicate that title would not vest in the United States after the partial payment requested had been received. It should be noted that the amount in question represents the total of partial payments requested prior to August 31, 1951, on which payments were received later that same year. Murray's Annual Report for 1951 is for the period ended August 31, 1951 and title to the goods on the initial partial payment request did not vest in the Government until such partial payments were received, which was subsequent to August 31, 1951.

In the succeeding Annual Report for the year ended August 31, 1952, goods on hand under these subcontracts were not included in Murray's inventory—since title was in the Government—but Murray combined all the amounts that it had expended, less those received in the form of partial payments, and classified the whole net amount as a separate item on its balance sheet (Exhibit 12 (R. 262)) which, upon advice of its public accountants, was designated as "Total Recoverable Amounts Applicable to Government Contracts."[38]

The argument that Murray was responsible in determining whether or not scrap would be re-worked or scrapped, and if scrapped, charged to its costs, is not inconsistent with title vesting in the Government. (Appellants' Brief, page 70, point 8.) The same argument was urged and rejected in the *Ansonia* case (p. 467).

The contention that the method of shipping and consigning goods in the name of the subcontractor (Murray) as a consignor to the prime contractor as consignee is inconsistent with ownership in the Government (Appellants' Brief, page 70, point 9) is also not valid. This method of handling was merely for convenience. Certainly, Murray could not by its use of a form of bill of lading deprive the Federal Government of title to property which belonged to the Government. (See Williston on Sales, Revised Edition, Sec. 421.)

The argument that final inspection of the completed engine or aircraft at the plant of the prime contractor or at the air field indicates that title did not pass prior thereto (Appellants' Brief, page 70, point 10) is likewise specious. First, it is to be observed that inspection by the Government of parts made by Murray is made at the Murray plant. Furthermore, the point of inspection is not the determining factor as to the time or place when and where title vested. Title vested at the time Murray received the first partial payment under the subcontract, subject to being divested if rejected (See the *Ansonia* case on this point, 218 U.S. 452, 464-5). Likewise the argument that the right to reject and the method of handling rejected work was inconsistent with title being vested in the United States (Appellants' Brief, page 70, point 8) was also held to be ineffectual in the *Ansonia* case, 218 U.S. 452, 467.

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[38] "The Murray Annual Report for the Year Ending August 31, 1952 (Plaintiff's Exhibit 12, (R. 262-3)), being the first Annual Report following receipt of the first partial payment, clearly indicates that Murray did not treat or consider the partial payments as advances, loans, indebtedness or a liability of any kind. No liability is shown on the Balance Sheet for such partial payments. There is no debt and no lien to secure repayment of any debt. (See Sammon Affidavit par. 11(c) (R. 54-5); Sammon deposition, page 55.) See page 66 hereof.

Compare Murray's 1945 Annual Report (Plaintiff's Exhibit 13, (R. 268-71)) when Murray had obtained a true "advance" payment from the Government—which was a loan secured by a lien, prior to work being done—which Murray showed on its Balance Sheet as a liability—"Advance Payments Received from Prime Contractors on Costs Plus a Fixed Fee Contracts" (See Affidavit of Mark I. Sammon, Paragraph 11(c), (R. 54-5); see Sammon deposition, page 13 et seq. for handling of "advance" payments as distinguished from partial payments).

Appellants' contention (Appellants' Brief, page 71, point 11) in respect to the method of carrying insurance was heretofore answered at pages 72-75.

Virtually every argument of Appellants in support of their contention that the conduct of the parties was inconsistent with title being vested in the United States was urged and rejected by the *Allegheny* and *Ansonia* cases. Contrary to the contention of the defendants, the conduct of the parties was not inconsistent with the express intention of the parties that title vest in the United States.

Offutt Housing v. *Sarpy*, 351 U.S. 252 (1955), relied upon by Appellants (Appellants' Brief, p. 71; also pp. 53, 55) is inapposite to the case at bar. There land owned by the United States was leased to plaintiff housing company for a seventy-five year term under the Wherry Military Housing Act. 12 U.S.C.A. Sec. 1748. The plaintiff erected buildings thereon and rented the same to military personnel and collected and retained rents therefrom.

The local taxing authorities levied a personal property tax upon the improvements and furniture (not the land) used by plaintiff. Two issues were presented to this Court:

(1) Whether Congress had consented to taxing of the property by the state; and

(2) If such consent had been given by Congress, could the entire value of the property be taxed to the plaintiff without any diminution of such value because of the Government's reversionary interest in such property.

The majority opinion held that Congress had consented to the taxation of such property by statute saying—

> "We hold **only** that Congress, in the exercise of this power, has permitted such state taxation as is involved in the present case." (p. 260)

In the instant case Congress has not consented to taxation of its property by local units of government and the constitutional immunity of such property from local taxation remains inviolate.

On the second issue the Court, having determined that state taxation was permissible by consent of Congress, held that since the life of the personal property would end before the Government would come into enjoyment, it had only a "paper title" and the full value of such property was accordingly properly assessable to plaintiff housing company, saying:

> "The lease is for 75 years; the buildings and improvements have an estimated life of 35 years. The enjoyment of the entire worth of the building and improvements will therefore be petitioner's." (p. 261)

In the instant case, entire worth of the property involved was that owned by the Government. Murray did not have the right to use the property for its own benefit and the materials and work in process were specifically manufactured to the Government's specifications for the sole use and enjoyment of the Government. Applying the rationale of the *Offutt* case to the case at bar, there can be no question that the Government was the beneficial owner of the property here involved.

There is no warrant or basis for Appellants to say (Appellants' Brief, page 72) that "we find here as in *Offutt* that the acts of the parties were inconsistent with the claim of title."

The title and beneficial ownership, in form and in substance, was vested in the United States. The Government was the purchaser of the material, made pursuant to its specifications, for its special use for defense purposes.

IV.

Was the property of the United States, in possession of Murray, immune from personal property taxes assessed by Appellants?

The Lower Court answered "Yes."

Appellee contends the answer should be "Yes."

It is the position of Appellee that—

(a) on tax assessment day absolute title—not bare security title—vested in the United States (supra, pages 62-90);

(b) the taxes assessed are ad valorem taxes **upon the property**—and are not specific or privilege taxes—though payable by the owner or person in possession;

(c) personal property of the United States is immune from ad valorem property taxation by a state or subdivision thereof, whether or not such property is in the possession of the United States, or a bailee, even though such tax is assessed to such bailee, and not to the United States. *United States* v. *Allegheny County*, 322 U.S. 174 (1944); see *Kern-Limerick, Inc.* and *United States* v. *Arkansas*, 347 U.S. 110 at 123, footnote 14; compare, *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, at 499 and under Michigan authorities as well, *Taylor* v. *County of Genesee*, 286 Mich. 674, 677-8; *National Bank of Detroit* v. *City of Detroit*, 272 Mich. 610; Opinions of Mich. Attorney General, Jan. 17, 1936 and May 28, 1941.

These propositions are basic and controlling.

Appellants seek to avoid the impact of the controlling doctrine of the *Allegheny* case by contending that—

(a) (i) in the *Allegheny* case the Court held that

> " 'This form of taxation is not regarded as a form of personal taxation, but rather as a tax against the property as a thing.' (p. 1218, 88 L. Ed.) ;

whereas

> (ii) " . . . our personal property tax is regarded as a form of personal taxation rather than as a tax against the property . . ."

(Appellants' Brief, page 121 ; also 96-107) ;

(b) because the City of Detroit personal property taxes are payable by the owners or person in possession—

> "The direct burden or incidence of these taxes is, therefore, upon and against the independent contractor, appellee." (Appellants' Brief, p. 106.)

(c) therefore, the doctrine of constitutional immunity does not apply, citing and relying upon cases—which deal entirely with state privilege or excise taxes, except as noted hereinafter—where the incidence of the privilege or excise tax is directly upon a contractor even though such contractor may ultimately pass the economic burden on to the United States government.

Fifty-two pages of Appellants' Brief are directed to this argument (pages 77-129).

This entire argument is predicated upon the erroneous and fallacious contention of Appellants that the personal property assessment and taxes here involved are not upon the property, but upon the "owners or persons in possession."

This proposition is contrary to the law of Michigan and to the position asserted by the Corporation Counsel for the

City of Detroit in proceedings before the Supreme Court of Michigan.

The Personal Property Taxes of Appellants are Ad valorem taxes upon the property of the United States—although collection thereof is sought from Murray.*

Under Article X, Section 3, the Constitution of the State of Michigan of 1908, **only** two general methods of taxation by the State or subdivisions thereof are authorized—(1) ad valorem taxes and (2) specific or privilege taxes. *C. F. Smith Company* v. *Fitzgerald,* 270 Mich. 659, 672; *Pingree* v. *Auditor General,* 120 Mich. 95, 102, 109.

The City of Detroit personal property taxes here involved were assessed pursuant to Title VI, Chapter II, Section 1 of the Charter of the City of Detroit[39] which provides:

> "Section 1 **All** real and **personal property within the city subject to taxation by the laws of this state shall be assessed** at its true cash value by the board of assessors herein provided . . . **All taxes upon personal property** may be assessed in any district, **whether** the **person** assessed is a **resident of such district or not."**

The **collection** of such personal property taxes—as distinguished from the assessment thereof and the power to assess the same—is provided for under Title VI, Chapter IV, Section 1, as follows:

> "Section 1. All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien **on the property** taxed . . . The owners

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*This is so under Michigan decisions. However, even if Michigan decisions were otherwise, "where a federal right is concerned", this Court would not be bound thereby nor "relieved from the duty of considering the real nature of the tax and its effect upon the Federal right asserted". *United States* v. *Allegheny,* 322 U.S. 174, 184; *Kern-Limerick,* supra; *Society for Savings* v. *Ohio,* supra.

[39] See Appendix C attached hereto for pertinent sections of the Charter dealing with personal property taxes.

> or persons in possession of any **personal property** shall pay all **taxes assessed thereon.**"[40]

Both the City of Detroit and County of Wayne personal property tax assessments are made subject to the authority of the General Property Tax Act of Michigan, 206 of the Public Acts of Mich. 1893, as amended (6 Mich. Stat. Anno. Sec. 7.1-7.243).

The very title to the Michigan General Property Tax Law clearly indicates that the tax is an **ad valorem property tax**—and not a privilege tax or tax upon the person—

> "An act to provide for the **assessment of property** and the levy and collection of **taxes thereon** . . ."

Section 1 of said statute provides:

> "(M.S.A. Sec. 7.1) **Property** Subject to Taxation. Section 1. The People of the State of Michigan enact, that all **property,** real and **personal, within the jurisdiction of this state,** not expressly exempted, shall be **subject to taxation.**"

In regard to taxes assessed upon the personal property of corporations, the Michigan statute reads as follows (M.S.A. Section 7.11):

> "All corporate **property** except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation . . ."

The personal property taxes here assessed under the statute and City charter are **ad valorem taxes upon the property**—and not specific or privilege taxes assessed against the taxpayer. See *City of Detroit* v. *Phillip,* 313 Mich. 211, 213 and *Pingree*

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[40] 5 Mich. Stat. Anno. 1955, Sec. 5.2073 provides "that the **subjects of taxation** for municipal purposes shall be the same as for state, county and school purposes under the general law."

v. *Auditor General*, 120 Mich. 95, 102 and 109. Nevertheless, Appellants argue that the personal property tax, while admittedly an ad valorem tax, is regarded as a form of personal taxation when the person in possession is taxed and collection thereof is sought by way of action in assumpsit against him as a debt (Appellants' Brief, p. 121). This argument is completely unfounded and is contrary to the decisions of the Supreme Court of Michigan.

The **property** is the **basis** for and the **subject** of the **assessment and tax.** Only the **collection** machinery is directed against the owner or person in possession. In the very case upon which Appellants City and County rely, *City of Detroit v. Gray*, 314 Mich. 516, the Corporation Counsel for the City in his brief before the Supreme Court of Michigan on pages 23-24 successfully asserted:

> "Under the provisions of our Charter in an **ad valorem assessment upon personal property, the property and not the person** is assessed."[41] This Court said in the case of *Crawford v. Kock*, 169 Mich. 372, at p. 379, in part, as follows:
>
> > '*** It will be noted that here the charter provides for **the assessment being made against the property itself, rather than against the persons in possession** of the property at the time the assessment is made . . .' "

Not only is this the character of the personal property tax under the City of Detroit Charter, it is also the same under the General Property Tax Law of Michigan. In re *Ever Krisp Food Products Co.*, 307 Mich. 182, at 196, the Court said:

> "Under our tax laws, the **tax assessment** and lien **is** specifically **upon the whole personal property** 1 Comp. Laws 1929, Sec. 3429, as amended,* [Comp. Laws Supp.

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[41] This is directly contrary to the position now asserted by the Corporation Counsel for the City of Detroit and Counsel for the County of Wayne.

1940, Sec. 3429, Stat. Ann. Sec. 7.81]; Detroit charter, title 6, chap. 4, Sec. 1; *Crawford* v. *Koch*, 169 Mich. 372."

It is also to be noted that in the closing sentence of its opinion in the *Gray* case, the Michigan Supreme Court stated (page 521) that—

> "In the case at bar defendant as husband of the owner of the personal property was in possession of the same and is liable for the **personal property tax assessed against said property.**"

The Power to Tax is Predicated Upon Jurisdiction of the Property.

As this Court said in *United States* v. *Allegheny County*, 322 U.S. 174, supra, at page 184:

> "The **power to tax is predicated upon jurisdiction of the property,** not upon jurisdiction of the person of the owner . . ."

So, too, the power to assess the personal property tax here in question is dependent upon the situs of the property being within the jurisdiction of the taxing authority. The City Charter, Title VI, Chapter II, Section 1, provides—

> "Section 1. All real and personal **property within the city** subject to taxation by the laws of this state shall be assessed . . . All taxes upon personal property may be assessed in a district, **whether the person** assessed **is a resident** of such district **or not.**"

Likewise, under the State statute, it is provided:

> "(M.S.A. Sec. 7.1) Property Subject to Taxation. Section 1. The People of the State of Michigan enact, that all **property,** real and personal, **within the jurisdiction of this state** not expressly exempted, shall be subject ~~to~~ taxation."

The Michigan Supreme Court has clearly held that the situs of the property "within the City" of Detroit—even though the owner of the property resided outside of the C —was the basis for its power to assess the City of Detr personal property tax. *City of Detroit* v. *Phillip,* 313 Mi 211, 215, 217.

Even Assuming, Arguendo, that Appellants' Contention that the Tax is upon the Owner or Person in Possession and not upon the Property—Which is Erroneous—Since the United States is the Owner, the Tax Could not be Assessed upon it or Indirectly upon the Person in Possession.

Since the United States is the owner, it, and its prope is immune from state and local ad valorem taxation. Furth more, Appellants cannot sustain the tax by assessing Murr as the owner, for property owned by the United States. App lants in their brief (Appellants' Brief, p. 101) admit tha

> "a mistake in naming the owner . . . in the case o personal property assessment . . . can be **fatal** to coll tion of the tax. Detroit Trust Company vs. Detroit, Mich. 81; 256 NW 811."

The alternative suggestion of Appellants that a perso property tax upon property owned by the United States m validly be assessed to and upon the person in possession, ev though not the owner, also lacks validity.

The Michigan statute provides for the assessment of p sonal property at the place "in which the **owner resid** (Mich. Stat. Ann., Sec. 7.13), **except where the owner i nonresident, in which event** the **assessment** is made **to the p son in Michigan in possession** or control, **with a right of rec ery against** the **owner,** secured by a **lien** on the property (Mi Stat. Ann., Sec. 7.14, Par. Seventh).

The City of Detroit Charter has a provision substantia to the same effect. See Appendix E hereto, City Charter, Ti 6, Chapter 4, Sec. 7.

It is to be noted that under the General Tax Law of Mic gan, *Mich. Stat. Ann., Sec. 7.24*, it is also provided th "property assessed to one **other than the owner** shall be **assessed separately** from his property and shall show in what capacity it is assessed to him, whether as agent, guardian or otherwise." In the Assessment Roll of the City of Detroit, 1952, (Defendant's Exhibit 3, R. 103), Item 639, Murray was assessed for all of its personal property ($10,139,510) plus the cash value of the Government-owned property here in question ($2,043,670), making a total assessment of $12,183,180, and was not separately assessed for the Government-owned property in its possession. This indicates that the assessment as made was improperly directed to Murray as owner—not as the person in possession. See *U. S.* v. *Allegheny*, 322 U.S. 174, 187.

It is clear that under both the State law and the City Charter the only purpose of reaching the person in possession—in the absence of the owner—is for the purpose of **"collection"** from the owner. The person in possession is given the right to recover from the owner the tax attributable to the owner's property. See *Detroit Shipbuilding Co.* v. *City of Detroit*, 228 Mich. 145, supra, at 148, wherein the Court said:

> "To **assess the property** of a nonresident corporation to the corporation having possession thereof does not contravene any tax law of the city charter which has been called to our attention. Under the State law (Sec. 4008) and under the charter provisions (tit. 6, chap. 4, Sec. 1) the **collection** may be **enforced** against the one having possession, and both, State law and charter, provide that having paid it the person or corporation may **recover the tax from the person** or corporation **whose legal duty it was to pay it** (1 Comp. Laws 1915, Sec. 4043; Detroit Charter, tit. 6, chap. 4, sec. 7). And the State law gives the party so assessed a lien on the property for the tax paid (sec. 4008)."

Cases Cited By Appellants Do Not Support their Contention that the Ad valorem property here in question is a tax on the person.

In their argument (Appellants' Brief, page 97) that the personal property tax here is a tax on the person and not on the property, the appellants cite *Cooley on Taxation,* Vol. 1, 4th Ed., Sec. 24.

> "The individual and not his property, pays the tax . . ."

In this section, however, Cooley was concerned with **payment** of taxes **generally,** rather than with the nature or character of such taxes. The quotation therefore lends no support to Appellants' contention that the personal property tax is not a tax on the property.

The West Michigan Lumber Co. case, 73 Mich. 459, 41 N.W. 503, cited in Appellants' Brief at page 99, held that a personal property tax was not invalidated by the fact that the township supervisor attached his warrant (to the township treasurer) to the **original** assessment roll rather than to a **copy** of the assessment roll as directed by the statute. The language quoted from this case in Appellants' Brief (pp. 99-100) has reference to **both** real and personal property taxes and does not support the distinction which Appellants seek to make between those types of taxes.

Dunitz v. *Pick Co.,* 241 Mich. 55, 216 N.W. 382, cited in Appellants' Brief at page 101, decided only the question "whether the tax lien takes precedence over a chattel mortgage executed and filed before the lien attached." The Court ruled that the question had been squarely decided in the negative by *Lucking* v. *Ballentine,* 132 Mich. 584, which held that the lien for personal property taxes was secondary to the lien of a chattel mortgage given before the assessment. An amendment to the statute now makes the tax lien superior to mortgage and other liens regardless of chronological priority. *Detroit Trust Company* v. *Detroit,* 269 Mich. 81, 256 N.W. 811, cited in Appellants' Brief at page 101, was, according to the opinion, "controlled by the issue as to priority of claims" and held that the amendment was not retroactive. (It was made retroactive by a further amendment.) But, in any event, such questions as were raised in these cases are related to the matter of **collection** of the tax and do not affect the **nature** of the tax as being a tax **on property.**

Appellants cannot change the nature of the tax from one on the Government's property to a tax on Murray by devising a form of assessment "subject to prior rights of Federal Government".

Appellants argue that the tax is a personal debt of the appellee (Appellants' Brief, page 106), and that Appellants' secondary lien[42] is inferior to and "subject to prior rights of Federal Government" and, therefore, infers that the tax is not upon the Federal Government nor upon government-owned property (Appellants' Brief, pages 107-111). The fact that a valid personal property tax creates a personal debt against the taxpayer under Michigan law does not support the proposition in this case that it is a tax against Murray and not upon the Federal Government property. As has been pointed out hereinbefore, in Michigan the tax is an ad valorem **property** tax and it properly may be said here, as was said in *U.S.* v. *Allegheny County,* 322 U.S. 174, at 184:

> "This form of taxation is not regarded primarily as a form of personal taxation but rather as a **tax against the property as a thing.** Its procedures are more nearly analogous to procedures **in rem** than to those in personam. **While personal liability for the tax may be** and sometimes is

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[42] It is to be noted that—notwithstanding counsel for Appellants referring to their lien as a secondary lien, as being "subject to prior rights of Federal Government,"—the Michigan Statute *(Mich. Stat. Ann., Sec. 7.81)* specifically provides—

> "The personal property taxes hereafter levied or assessed by any city or village shall be a **first lien, prior, superior** and **paramount to any other claims, liens and encumbrances whatsoever** upon the personal property assessed as herein provided, any provisions in the charter of such cities or villages to the contrary notwithstanding."

> **imposed,** the **power to tax is predicated upon jurisdiction**[43] **of the property,** not upon jurisdiction of the person of the owner, . . ."

In respect to the contention that the County and City tax lien would be secondary to that of the Federal Government's lien (which Appellants assert the Federal Government has instead of absolute title) it may properly be said here, as was said in the *Allegheny* case at page 187:

> "But **renunciation of any lien on Government property** itself, which could not be sustained in any event, **hardly establishes that it is not being taxed."**[44]

Every contention here made by the City is directly contrary to the controlling principle announced in *United States* v.

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[43] Appellants' argument (Appellants' Brief, pages 103-105) that "the provision for lien does not change the character of assessment" is and the authorities cited therein are completely inapposite to the case at bar. The nature and character of the personal property here involved must be determined by reference to the Michigan statutes and not by reference to the statutes and decisions of other jurisdictions. Clearly the Michigan personal property tax is dependent upon the property having a situs within the territorial limits of the taxing authority and is by any test a tax upon the property, not the person. (See pages 95-6, supra.)

[44] The City of Detroit cites *S.R.A.* v. *Minnesota,* 327 U. S. 558 and *Edward Hines Lumber Co.,* 248 P. 2d 720 and *New Brunswick* v. *United States,* 276 U.S. 547 (Appellants' Brief, pages 107-110), for the proposition that the Federal government is protected by the City stating on the assessment roll that the assessment was "subject to prior rights of the Federal government." These cases do not stand for that proposition at all. They merely hold that where the Federal government has sold property on contract and retained only a bare vendor's security lien to assure payment of the purchase price, that a State ad valorem tax assessed upon the interest of the vendee in such property was valid, subject to the paramount rights of the government. In those cases the Federal government retained no beneficial interest in the property whatsoever. In the case at bar the Federal government was the purchaser—and not the seller—and was vested with both the legal title as well as with the full beneficial interest in the property. See supra, page 68, footnote 29.

llegheny County, 322 U.S. 174, in which the Court held:

> "We think, however, that the Government's property interests are not taxable either to it or to its bailee (page 187) . . . Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes . . . Neither he nor the Government can be taxed for the Government's property interest . . . pages 187-8) . . .

> "We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee." (Page 189.)

The Allegheny case is here controlling. The tax and the incidence thereof is upon the property of the United States which is immune from ad valorem taxation by a State or subdivision thereof.

The "direct burden or incidence rule" relied upon by Appellants applies primarily to privilege or excise tax cases, which are here inapposite. Appellants in support of their contention that the incidence of the personal property tax in the instant case is upon Murray and not upon the Federal government cite and rely upon *Esso Standard Oil Company* v. *Evans,* 345 U.S. 495; *James* v. *Dravo,* 302 U.S. 134; *Alabama* v. *King & Boozer,* 314 U.S. 1; *Graves* v. *New York,* 306 U.S. 466; *Helvering* v. *Mountain Products Corporation,* 303 U.S. 376; *Oklahoma Tax. Comm.* v. *Texas Co.,* 336 U.S. 342 (Appellants' Brief, pages 85, 87).

It is significant indeed that each of these cases involved excise or privilege taxes, for a privilege exercised by the contractor, where the incidence of such privilege tax was upon the contractor, although the economic burden was subsequently passed by such contractor to the Government. These privilege taxes are basically different in character and must be distinguished from an ad valorem property tax upon the property —title to which is vested in the United States—where the incidence is directly and solely upon the property assessed.

In the *Esso* case, relied upon by Appellants, the Court distinguished between the assessment of ad valorem property taxes upon property title to which was vested in the United States Government and excise or privilege taxes imposed upon a privilege granted to a private contractor, although the ultimate economic burden falls upon the Government. The Court in the *Esso* case said, at page 499:

> "*Allegheny County*, however, was quite different. The United States had leased certain machinery to the Mesta Machine Company. In imposing the state **ad valorem property tax,** Pennsylvania included in the Mesta assessment both the privately owned land and buildings, and the government machinery. *Id.* at 179-180, 186. So the value of the federal property was, in part, the measure of the tax. We held the substance of this procedure was 'to lay an **ad valorem general property tax on property owned by the United States,'** id., at 185 **and therefore invalid. Our holding was not 'dependent upon the ultimate resting place of the economic burden of the tax.'** *Id.*, at 189.
>
> "This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not 'on' the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 151, this has been no fatal flaw."

To same effect see *Federal Reserve Bank* v. *Revenue Department*, 339 Mich. 587, at 597-8.

The so-called direct burden and incidence tests are applied to privilege taxes in *Dravo, King & Boczer, Graves and Helvering* v. *Mountain Products Corporation.* This test and these cases like the *Esso* case are not applicable to cases involving ad valorem taxes upon property owned by the United States.

The ad valorem personal property tax in the case at bar is levied upon the property owned by the United States just as it was in the *Allegheny* case. Accordingly, the contention of Appellants that the incidence of the tax is upon Murray rather than the Government is fallacious. The legal incidence of the tax cannot be shifted to Murray by the City's erroneous assessment to Murray of Government-owned property which is immune from taxation. The complete and absolute ownership of such property was vested in the Government on assessment day. The tax was directly upon the property and the incidence of the tax fell directly upon the property and upon the Government which owned the property.

As recently as February, 1954, the Court in *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 at 123, expressly stated:

> " . . . the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for **decisions consistently prohibits taxes levied on the property** or purchases **of the Government itself.**"

citing *United States* v. *Allegheny County*, 322 U.S. 174.

The doctrine of the *Allegheny* case is still here controlling.

There is No Support for Appellants' Attempt to avoid the impact of immunity under Ansonia and Allegheny.

Appellants' contention that the Government owned property here in question is subject to taxation, under some supposed limitation on the doctrine of constitutional immunity purportedly announced in *Thompson* v. *Union Pacific R.R.*

Co., 76 U.S. 579, 16 Wall. 579 (1869) and *Union Pacific R.R. Co.* v. *Peniston*, 85 U.S. 5, 18 Wall. 5 (1873) is completely unsupported. Each of these cases involved taxation of property which was "neither in whole nor in part the property of the Government" (*Union Pacific R.R. Co.* v. *Peniston*, p. 32). As stated by this Court in *U.S.* v. *Allegheny County*, 322 U.S. 174,186—

> "We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands."

We are not here concerned with cases involving the taxation of property not belonging to the United States, but where the claim is asserted that the **operation or instrumentalities** of the Government are nevertheless interfered with. Notwithstanding, the difference between such cases and the one at bar Appellants nevertheless contend that the "Substance and effect of this tax do not constitute Interference with operations of Government" (Appellants' Brief, pp. 113-120).

Here, as in *Allegheny*, we are concerned primarily with a State tax upon Government owned **property.** Here, title and ownership to the **property** being **vested in the Government,** immunity from state taxation obtains, unless waived by Congress. The Government in its procurement program and policy has long provided for such title and ownership under partial payment clauses in procurement contracts and since *Ansonia*, such title in the Government, has resulted in immunity from state tax and liens.

For Appellants now to suggest that immunity does not here obtain and that the Government does not seek control over defense work in process, because the contractor requests the partial payments (Appellants' Brief, pp. 116-119) and that "immunity" cannot "be turned on and off by individuals like a water faucet" (Appellants' Brief, page 119) is to deny *Ansonia* and this Appellants have nowhere directly attempted to do. Appellants, in effect attempt to re-argue what *Kern-*

Limerick rejected. The contention of the State there was that the power of a government official to provide for an agency buying arrangement in a procurement contract could not thereby secure immunity. This Court held otherwise.

Furthermore, to suggest that the partial payment-title vesting clause is one where the contractor seeks payments (with the resultant vesting of title in the United States) or not, at its whim and caprice, is to ignore the practical, day to day, operation of the clause and the impelling necessity which assures that wherever the clause is used it will be invoked, partial payments will be made and title will vest in the Government. As we pointed out hereinbefore, at pages 80-81, since the performance of defense contracts of the character at bar involve the expenditure of large amounts and the completion of the contract is necessarily spread over a long period of time, in practical operation, the contractor—having the right so to do under the partial payment clause—takes down virtually as much of the purchase price as the clause permits (90% in Kaiser & 75% in Wright of costs expended) as the work progresses, rather than strain its own resources, which is neither warranted nor expected. The operation of the clause at Murray, in the case at bar, where Murray was paid $14,940,516 of an aggregate amount of costs of $16,264,771 as of June 30, 1953, demonstrates how defense contractors are impelled by sound business practice and necessity to utilize virtually to the fullest extent their right to obtain partial payments upon the purchase price as the work progresses.

Thus, when the Government uses partial payment-title vesting clauses in over 80% of its Air Force Procurement contracts for aircraft, it is virtually a certainty that partial payments will be made and title will vest in the Government in almost every instance.

Appellants fail to answer *Ansonia* and attempt futilely to distinguish *Allegheny*. Appellants' attempt to distinguish

Allegheny (Appellants' Brief, pp. 120-126) amounts to no more than their own criticism of and statement of dissatisfaction with the Court's decision. Their contention that the "incidence" of an ad valorem property tax is not upon the property but upon the person to whom the tax bill is sent is contrary to the fundamental law of taxation, the Constitution and statutes of the State of Michigan, the Detroit City Charter and the entire trend of judicial decisions.

CONCLUSION

The subcontracts here in question are an integral part of the Air Force Procurement program and are inextricably tied to the prime contracts. The Government appropriately reserved unto itself certain rights and powers over the subcontracts by clear and explicit language in the prime contracts. This is entirely consonant with the expressed statutory authority contained in Section 4(a) of the Armed Services Procurement Act (41 U.S.C.A. 153) permitting the Contracting Officer to enter into any type of contract which "will promote the best interests of the Government." Exercising such authority and discretion, partial payment clauses with the vesting of absolute title in the Government were specifically provided for in the Murray subcontracts—just as they are provided for in over 80% of the prime and subcontracts entered into by the United States Air Force.

Counsel for the Appellants would change the express provisions of the contracts. They would override the clearly stated intention of the parties that absolute title vest in the Government upon receipt of a partial payment. The contracts are as clear as English words can make them. The title to all parts, materials, inventories and work in process vested in the Government upon Murray's receipt of a partial payment with no ifs, ands or buts.

Appellants cannot rewrite or distort basic military procurement policy of the United States. This policy contemplated that partial payments would be made upon the purchase price as the work progressed, with title and control over the vital defense materials at all times reposing absolutely in the United States Government. Such ownership and control were deemed important and essential.

On January 1, 1952 the United States Government was the owner of the defense property and materials here in question. The immunity from state and local ad valorem taxation, which attaches to such ownership by the Federal Government, is safeguarded under our Constitution and form of government.

Congress has the power by express legislation to waive such tax immunity. So far it has declined to do so in connection with the procurement of defense materials. As stated in *United States v. Allegheny County*, 322 U.S. 174, at 177:

> " . . . unshaken, rarely questioned, . . . is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation."

Appellants contend that to apply the doctrine of immunity would result in hardship and inequities. As this Court has always recognized—

> "The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization . . .
>
> " . . . our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in

petition to the Federal Congress, which also is their Congress."[45] *U. S. v. Allegheny County*, 322 U.S. 174, 190-91.

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[45] Congress is indeed aware that the use of partial payment-title vesting clauses is widespread and that such clauses impart tax immunity to the property acquired for the national defense. Hearing before the Committee on Government Operations, United States Senate, 84th. Congress, 1st. Session, Part I, Appendix II, page 200 (1955).

The entire question of immunity of Government-owned property, real and personal, work in process, as well as instrumentalities of Government and the impact upon State and local taxing units, and the United States has received and is now receiving thorough and comprehensive study and consideration. See Hearings, Reports and Proposed Legislation, 84th. Congress, 1st. Session, Parts I and II, (1955).

See also Report of the Interdepartmental Committee for the Study of Jurisdiction in Federal Areas within the State, Parts 1 and 2. Part 1 submitted to Attorney General and transmitted to President April, 1953 captioned The Facts and Committee Recommendations. Part 2—The Text of the Law of Legislative Jurisdiction, transmitted to the Attorney General and President, June, 1957.

As the Court has said, whether or not and to what extent immunity is waived is solely for Congress to determine.

The Appellee, The Murray Corporation of America, respectfully prays that the judgment of the District Court as affirmed by the Court of Appeals be affirmed.

Respectfully submitted,

Victor W. Klein

William M. Saxton

Attorneys for Appellee

The Murray Corporation of America

APPENDIX "A"

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.

Section 151. Purchases and contracts for supplies and services —(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

. . . . . .

Advertising requirements; exception of certain purchases and contracts from requirements.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

7

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

. . . . . .

(10) for supplies or services for which it is impracticable to secure competition;

. . . . . .

Section 153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151(c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideraton the full amount of such commission, percentage, brokerage or contingent fee.

(c) All contracts negotiated without advertising pursuant to an authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Feb. 19, 1948, c. 65, Sec. 4, 62 Stat. 23; Oct. 31, 1951, c. 652, 65 Stat. 760.

. . . .

APPENDIX "B"

Armed Services Procurement Regulations (A.S.P.R.) 3-407.2 (1), (1947 Supplement Code of Federal Regulations Title 10, Chapter VIII, Paragraphs 805,407-2, Effective November 1, 1947, Printed in 12 F. R. 7693).

Sec. 805.407-2 *Partial Payments*—(a) *When payments ar not to exceed 75 per cent of the cost of the property.* In thos cases where it is contemplated that partial payments in a amount not to exceed 75 per cent of the cost to the contractor of the property will be made, the contract will contain the following article:

Partial payments: Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: *Provided*, That such partial payments shall not exceed 75 per cent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: *Provided further*, That in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 per cent of the total contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided*, That nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder: or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed ~~supplies~~, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and the applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct, and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Artcle shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

Appendix "B"

(b) *When payments are not to exceed 90 per cent of direct labor and material costs.* In those cases where it is contemplated that partial payments in an amount not to exceed 90 per cent of the direct labor and material costs to the contractor will be made, the contract will contain the following article:

Partial payments. Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: *Provided*, That such partial payments shall not exceed 90 per cent of the direct labor and direct material costs to the Contractor of the property upon which payment is made, which costs shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; *Provided further,* That in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 per cent of the contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided,* That nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may l sold by the Contractor without approval of the Contractin Officer but the proceeds will be applied as provided in th paragraph (d), provided that any such scrap which is a pa of the termination inventory may be sold only in accordan with the provisions of the termination article of this contra and applicable laws and regulations. Upon liquidation of a partial payments hereunder or upon completion of deliveri called for by this contract, title to all property (or the pr ceeds thereof) which has not been delivered to and accepte by the Government under this contract or which has n been incorporated in supplies delivered to and accepted l the Government under this contract and to which title ha vested in the Government under this Article shall vest in t Contractor.

(e) The article of this contract captioned "Liability f Government-furnished Property" and any other provision this contract defining liability for Government furnish property shall be inapplicable to property to which the Go ernment shall have acquired title solely by virtue of t provisions of this Article. The provisions of this Article sha not relieve the Contractor from risk of loss or destructi or of damage to property to which title vests in the Gover ment under the provisions hereof.

(f) If this contract (as heretofore or hereafter supp mented or amended) contains provision for Advance Pa ments, and in addition if at the time any partial payment to be made to the Contractor under the provisions of this pa tial payments article any unliquidated balance of adva payments is outstanding, then notwithstanding any oth provision of the Advance Payments Article of this contra the net amount, after appropriate deduction for liquidati of the advance payment, of such partial payment shall l deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

APPENDIX "C"

Armed Services Procurement Regulations, 32 Code of Federal Regulations, 1949 Ed., 1950 Pocket Supp., Chap. IV, Sub-part E, Section 402.501.

Nature of Advance Payments. Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. Advance payments are to be distinguished from "partial payments" and "progress payments" and other payments made because of performance or part performance of a contract.

APPENDIX "D"

Michigan General Property Tax Act

Compiled Laws of Michigan, 1948, Section 211.1 (Mich. Stat. Anno., Vol. 6, Sec. 7.1)

"211.1 Property subject to taxation.

> "Sec. 1. That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Compiled Laws of Michigan, 1948, Section 211.10 (Mich. Stat. Anno., Vol. 6, Sec. 7.10)

"211.10 Annual Assessment

Appendix "D"

> "Sec. 10. An assessment of all the property in the state, liable to taxation, shall be made annually in the several townships, villages and cities thereof by the supervisors of the several townships and wards, or in villages and cities where provision is made in the acts of incorporation or charter for some other assessing officer, then by such assessing officer, as hereinafter provided."

Compiled Laws of Michigan, 1948, Section 211.40

(Mich. Stat. Anno., Vol. 6, Sec. 7.81)

"211.40 Property taxes; lien, priority.

> "Sec. 40. The taxes thus assessed shall become at once a debt due to the township, city, village and county from the persons to whom they are assessed, and the amounts assessed on any interest in real property shall, on the first day of December, for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. And all personal taxes hereafter levied or assessed shall also be a first lien, prior, superior and paramount, on all personal property of such persons so assessed from and after the first day of December in each year for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, and so remain until paid, which said tax liens shall take precedence over all other claims, encumbrances and liens upon said personal property whatsoever, whether created by chattel mortgage, title retaining contract, execution, or upon any other final process of a court, attachment, replevin, judgment or otherwise, and whether such liens, claims and encumbrances created by chattel mortgage, title retaining

contract, execution or upon any other final process of a court, attachment, replevin, judgment or otherwise, become effective prior to the effective date of this act or subsequent thereto, and no transfer of personal property assessed for taxes thereon shall operate to divest or destroy such lien, except where such personal property is actually sold in the regular course of retail trade. The personal property taxes hereafter levied or assessed by any city or village shall be a first lien, prior, superior and paramount to any other claims, liens and encumbrances whatsover upon the personal property assessed as herein provided, any provisions in the charter of such cities or villages to the contrary notwithstanding."

APPENDIX "E"

CHARTER OF THE CITY OF DETROIT

TITLE VI

CHAPTER II

Assessments-General

. . . . . .

Assessments; Districts; Rolls:

Section 1. All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. Assessments shall be made according to assessment districts, the boundary lines of which shall conform to ward boundaries as established from time to time by the common council. There shall be an assessment roll in book form for each such district. All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not.

TITLE VI

CHAPTER IV

TAXES

Date Payable; Liability for Payment:

Section 1. All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed. The owners or occupants or parties in interest to any real estate assessed hereunder shall be liable to pay such taxes, and all assessments levied in accordance herewith. The owners or persons in possession of any personal property shall pay all taxes assessed thereon.

. . . .

Persons in Possession Liable for Tax:

Sec. 7. In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same, in an action of assumpsit as for moneys paid out and expended for his benefit, or may deduct the amount from any rent due or to become due to the person who should have paid such tax.

Collection of Taxes on Personal Property:

Sec. 26. On and after the twenty-sixth day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other than real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining thereafter shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal propertly shall become on said fifteenth day of July a lien thereon and so remain until paid, and no transfer of the personal property assessed shall operate to divest or destroy such lien. (As amended April 5, 1937. In effect April 14, 1957.)

. . . .

Taxes a Debt:

Sec. 27. All city taxes upon personal property and real estate and special assessments thereon in addition to being a lien upon the property assessed shall become a debt against the owner from the time of the listing of the property for assessment, and shall remain a debt against the owner of the property or his estate after his death, until the same are paid.

. . . .

APPENDIX "F"

Compiled Laws of Michigan, 1948, Section 117.3 (Mich. Stat. Anno., Vol. 4, Section 5.2073).

Home Rule Cities

Mandatory charter provisions.

* * * *

Taxation. (f) That the subjects of taxation for municipal purposes shall be the same as for state, county and school purposes under the general law.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Appellee, and
THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 36

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Petitioners,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Respondent, and
THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Reply Brief
of
Appellee and Respondent

Two days before the oral argument, Appellants filed a 47 page reply brief (in addition to their initial 130 page presentation). A few comments in respect thereto may be helpful to the Court.

I.

Appellants' belated effort to distinguish Ansonia is specious.

Ansonia, 218 U.S. 452, 467, is and throughout has been a key authority for the proposition that title and beneficial ownership vests in the United States—not merely lien or security title—under partial payment-title vesting clauses, where the seller and the buyer clearly intend title to pass to goods "before its completion and at different stages of its progress". Both the District Court and Circuit Court of Appeals relied thereupon. Notwithstanding, Appellants only casually considered *Ansonia* in their main brief and then belatedly attempt to distinguish it from the case at bar in a tenuous argument in their reply brief (pp. 3-4; 11-12; 16-25).

In effect, Appellants claim that *Ansonia* is different from the present case, because "The contractor **there** agreed to sell and the Government agreed to buy each completed part of the vessel and to pay full price therefor." where **here** "The Government neither purchased nor ever intended to have beneficial use of materials or to take delivery of them, except as they were formed and processed into specific end items" (Appellants' Brief, p. 18).

Appellants argue that "completed parts" was the thing to which title passed in *Ansonia* and that would not embrace materials, supplies and work in process at Murray, prior to their becoming completed parts (Appellants' Reply Brief, pp. 4, 11-12, 17-19).

Title to the vessel passed to the United States upon partial payment "before its completion" and while the work thereupon was in "progress" (*Ansonia*, p. 457). Payments in *Ansonia* were to be made in "ten (10) equal payments . . . when the hull and propelling machinery should be 10 per cent complete, the second when 20 per cent complete, and so on . . . " (*Ansonia*, pp. 465-6). A 10 per cent completed hull or propelling machine is not a completed part—as suggested by Appellants here. The reference in "Section 211" of the *Ansonia* contract referring to "The **parts** paid for under the system of partial payments . . . shall thereupon become the sole property of the United States . . . " (*Ansonia*, p. 466) means no more than that **portion** of the hull and propelling machinery completed—to-wit, "10 per cent complete" (*Ansonia*, pp. 465-6) and not any completed or severable unit or part of the vessel. As used in *Ansonia* the reference to "parts paid for" clearly meant **portions** of the **uncompleted vessel** . . . at different stages of its **progress.** (*Ansonia*, pp. 466-472).

Clarkson v. *Stevens*, 106 U.S. 505, discussed by Appellants in their reply brief, clearly holds that the United States may acquire title to "materials" prior to their being formed into the vessel or a completed unit thereof, where such intent is expressed in the contract. Furthermore, the Court in *Ansonia*, (p. 469) recognizing that in *Clarkson* v. *Stevens*, the contract only provided for title of "materials received at the yard", but not to the vessel as fast as parts thereof were constructed, did not preclude the vesting of title in the United States as the work progressed where the contract did so provide. The subcontracts in the case at bar clearly provide in unequivocal language that

> "Upon the making of any partial payment, under this contract title to all parts, **materials, inventories, work in process** and non-durable tools theretofore acquired or produced by the contractor for the performance of this contract, and properly chargeable thereto . . . shall forthwith vest in the Government; and title to all like property thereafter acquired . . . shall vest in

the Government forthwith upon said acquisition or production." (R. 175; 184). (See Appellee's Initial Brief, pp. 12-14; 16-17).

In *Ansonia* the Court was aware of the difference between partial payment-title vesting clauses, (vesting absolute **title** in the United States, as **buyer**) and advance and loan provisions, where the Government only obtained a **lien.**

II.

Appellants' argument that title to "materials" in United does not satisfy prohibition of R.S. 3648, as do "specifications" is likewise fallacious.

So long as the United States is vested with title to goods, whether in process or in material form, or receives the benefit of services, it may properly make payment for the equivalent value thereof without violating R.S. 3648.

The equivalent in value is the determining factor and not the form of the goods or services. (See our initial brief and authorities, pp. 43-47).

III.

"Risk of loss" and disposition "upon terms approved by contracting officer".

Appellants argued and *American Motors* held that because the "risk of loss" was in the contractor (seller), title and ownership did not vest in the United States (the buyer).

This is directly contrary to *Ansonia*, (p. 465) where the contractor, under "Section 206 of the specifications . . . assumes full responsibility for . . . plant and materials and for any damage or injury done . . . to them from any source or cause".

See Williston on Sales, Sec. 302, Rev. Ed., and our initial
ief, pp. 72-5.

Furthermore, Appellants and *American Motors* errone-
sly contend that the power of disposition of any ma-
rials on hand is in the contractor in a manner inconsistent
th Government ownership.

This clearly is not so. The contract expressly requires
at no property under the contract may be disposed of
cept "upon terms approved by the contracting officer"
. 176) and this absolute control in the Government of
operty owned by it, effectively precludes disposition by
contractor without prior direction or approval of the
vernment. This approval is more than a mere book-
eping requirement, as suggested by Appellants and
nerican Motors. Furthermore, the proceeds of any dis-
sition belong to the Government.

CONCLUSION

In these critical times when greatly increased defense
penditures by the Federal Government is imperative,
d States and municipalities are clamoring for increased
venues, and seek to tax defense material of the Govern-
nt in the hands of contractors, the remedy, (waiver of
munity), if any, is not judicial, but is for Congress,
ich presently is giving thorough study to the problem.

Respectfully submitted,

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Respondent

Meyer H. Dreety
Assistant to Staff
Judge Advocate,
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II

Nos.
18
36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, *Appellants,*

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, appellee, and THE UNITED STATES OF AMERICA, *Intervenor.*

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Page

Interest of Amici Curiae 1

Summary of Argument 3

Argument 4

I. Local governments are faced with a serious financial problem because of the restriction placed on their ability to raise revenue by the implied Doctrine of Federal tax immunity 4

II. The history of the Doctrine of Federal immunity shows that it should be applied only where needed as security against unbridled taxation without representation. That reason does not apply in the instant case 7

III. The application of the rule of Federal immunity in this case would have the effect of requiring the people of Detroit to pay out of their own pockets for municipal services which benefit all the people of the nation 8

IV. The holding of *United States* v. *Allegheny* is not controlling here, and should not be extended to allow the Federal government to transfer its tax immunity to private parties by contract in this manner 10

V. New cases should be decided in the light of present conditions 11

Conclusion 11

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Decisions

Alabama v. *King & Boozer*, 314 U.S. 1 (1941) 7

Butler v. *United States*, 297 U.S. 1 (1936) 6

Esso Standard Oil v. *Evans*, 345 U.S. 495 (1953) 7, 10

Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) 10

Page

James v. *Dravo Contracting Co.*, 302 U.S. 134 (1937) 7

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Thomas v. *Gay*, 169 U.S. 264 (1898) 8

United States v. *County of Allegheny*, 322 U.S. 174 (1944) 10

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4 Journal of Public Law 4

Municipalities and the Law in Action 3

43 National Municipal Review 9

National Tax Association, Proceedings of the Forty-Fifth Annual Conference 5

National Tax Association, Proceedings of the Forty-Sixth Annual Conference 4

20 NIMLO Municipal Law Review 2

21 NIMLO Municipal Law Review 3

MISCELLANEOUS

American Municipal News, Sept. 16, 1957 5

Hearings Before the Committee on Government Operations, U.S. Senate, 84th Congress, 1st Session, on S. 826 5

Hearings Before the Subcommittee on Legislative Program of the Committee on Government Operations, U.S. Senate, 83d Congress, 2d Session, on S. 2473 2

Report Released by United States Department of Commerce, Bureau of the Census, on August 23, 1957 4

Resolution Against Drawing of Defense Contracts to Prevent Local Taxation, 1957 NIMLO Conference 3

Rule 42(4), United States Supreme Court 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, *Appellants*,

vs.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, APPELLEE, AND THE UNITED STATES OF AMERICA, *Intervenor*

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS.

INTEREST OF AMICI CURIAE

The National Institute of Municipal Law Officers (NIMLO) is an organization of more than one thousand municipalities located in each of the 48 states, the District of Columbia, and in the territories of Alaska, Hawaii and Puerto Rico. Each member city acts through its chief legal officer, known variously as Corporation Counsel, City Attorney, City Solicitor, Director of Law, etc.

This brief is filed under Rule 42(4) of this Court. The members of NIMLO are political subdivisions of states and this Brief is sponsored by their authorized law officers.

The issue at stake in the instant case is of vital interest not only to the City of Detroit and Wayne County, but to many other municipalities which depend for financial support either wholly or partially on ad valorem property taxes.[1]

The nation-wide value of materials in the hands of Federal contractors, paper title to which has been transferred to the Federal government by partial payment-title transfer contract clauses, has been estimated by a government spokesman at more than $4 billion dollars.[2] The same spokesman concluded that this represented annual revenue of over $40 million dollars to local taxing authorities if not immune from their personal property taxes.[3]

The members of NIMLO have been active for many years, through their standing committee on Municipal Revenues from Federally-Owned Property, in seeking to correct the injustices and financial hardships which often arise from the rule of implied constitutional immunity of Federal property from local taxation.[4]

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[1] Approximately 75% of local tax revenues are derived from property taxes. *Report of Committee on Taxation and Revenues*, 20 Mun. L. Rev. 100, 102 (Nimlo 1957).

[2] Statement of I. M. Labovitz Assistant to Division Chief, Labor and Welfare Division, Bureau of the Budget, Hearings Before the Subcommittee on Legislative Program of the Committee on Government Operations, U. S. Senate, 83d Cong., 2d Sess., on S. 2473, pp. 50, 51 (1954). The Budget Bureau's estimate was as of June 30, 1953. The amount has undoubtedly increased a great deal since then.

[3] It is difficult to make such an estimate, since variance in assessment practices and ratios of assessed to full market values as well as tax rates materially enter into determination of such a figure. The Bureau of the Budget used an average rate of one percent as a "rough-and-ready basis." This rate was criticized as too low by Wilber M. Brucker, then General Counsel for the Department of Defense, in testimony before the same committee the following day. Mr. Brucker suggested a "conservative" average of two percent, based on pending cases including the instant case in which the rate was approximately three percent. *Id.* at 109-11

SUMMARY OF ARGUMENT

The rule of Federal immunity from local taxation, first enunciated by the Supreme Court in 1819, was intended to protect the people of the United States from unbridled discriminatory taxation by the local governments of any part of the United States. It was needed because the powerful states could easily tax the Federal government to destruction in the absence of any safeguard.

The Supreme Court has recognized that the rule is not absolute and there are instances in which it does not apply. In this case, the Court is asked to decide whether or not the rule should be applied to an instance in which a private corporation seeks to gain tax immunity by the transfer of paper title to part of its assets to the Federal government while retaining all the incidents of ownership. In deciding whether or not immunity should be thus extended, the Court should bear in mind that: (1) the tremendous growth of the Federal government has imposed severe financial hardship on local governments; (2) a safeguard against unbridled taxation is provided by the fact that the tax is nondiscriminatory and must also be paid by the voters who elect those who enact it; and (3) local governments provide municipal services to the Federal government and its contractors, which must be paid for.

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[4] See the reports of this committee in the Institute's annual publication, NIMLO MUNICIPAL LAW REVIEW (called MUNICIPALITIES AND THE LAW IN ACTION before 1953); see also Report of Committee on Federal-City Relations, 21 MUN. L. REV.—(NIMLO 1958). The National Conference of NIMLO, held Oct. 6-10, 1957, passed a Resolution Against Drawing of Defense Contracts To Prevent Local Taxation.

ARGUMENT

I. Local Governments Are Faced With a Serious Financial Problem Because of the Restriction Placed on Their Ability to Raise Revenue by the Implied Doctrine of Federal Tax Immunity.

In recent years, municipal expenses have increased to an all-time high. Cities have felt the impact of the rising cost of living. The cost of needed supplies and building materials has increased, and monthly wages and salary payments by cities have more than doubled since 1947.[5] In the face of all this, the public has demanded more and more municipal services, and the states have demanded higher standards for those services already performed.

To meet these increased expenses, the cities have been compelled to seek additional revenues. But they have found it difficult to do this, primarily for two reasons: First, the ever increasing burden of Federal taxation has made the average voter loath to support additional local taxes.[6] Second, the increasing property ownership of the Federal government has made more and more property immune from local taxation. The result is that the plight of many municipalities is extreme.[7]

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[5] *Report of Committee on Taxation and Revenues*, 21 MUN. L. REV.—(NIMLO 1958).

[6] In the twenty year period from 1932 to 1952, the percentage of total taxes collected by local governments fell from 56 percent to 12 percent. During the same period, the percentage of total taxes collected by the Federal government rose from 22 percent to 75 percent. Wetherby, *Fiscal Crisis in the States*, NATIONAL TAX ASSOCIATION, PROCEEDINGS OF THE FORTY-SIXTH ANNUAL CONFERENCE 291 (Welch ed. 1954).

[7] See Miller, *State Taxation of Federal Contractors*, 4 J. PUB. L. 299, 302 (1955). In both 1955 and 1956, American cities expended roughly $2 billion more than they received in form of revenue. The 1956 debt level for local governments represented a record end-of-year high—an increase of approximately ten percent. Report released by United States Department of Commerce, Bureau of the Census, on August 23, 1957, pp. 1, 2, 14.

One quarter of the total land area in the continental United States is owned by the Federal government, and hence tax exempt.[8] With atomic research and defense production activities added to the ordinary governmental functions, the value of personal property owned by the Federal government has likewise increased to immense proportions. The impairment to local revenues, which still derive mainly from ad valorem property taxes, is patent.

But a mere recital of total property owned by the Federal government gives no indication of the full impact on individual communities. The hardship to municipalities is compounded by the fact that this property is unevenly distributed throughout the nation. For instance, eleven states have within their boundaries 4/5 of all the Federally owned land, and each of five states have less than one percent.[9] Federal industrial plants, with their valuable machinery, equipment and inventories of goods, are scattered unevenly among communities, and frequently bring financial crisis to municipal governments where they locate. When tax immune industries come in, Chambers of Commerce may exult but practical city tax officials shudder. School systems and municipal welfare organizations soon become overburdened, street maintenance costs go up, and utility services, fire and police protection have to be increased.[10]

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[8] Study Committee Report, submitted to the Committee on Intergovernmental Relations, U. S. Senate, printed in *Hearings Before the Committee on Government Operations*, 84th Cong., 1st Sess., on S. 826, p. 164 (1955).

[9] *Id.* at 165. "The latest inventory of Federal holdings in California shows that Uncle Sam owns 46.7 per cent of the land, valued by the *original* acquisition cost at $291 million. Furthermore, Uncle Sam owns 49,115 buildings in the state with a value of over $1½ billion." American Municipal News, Sept. 16, 1957.

[10] *E.g.*, see the experience of one Connecticut city with an aircraft plant, as recorded in The Study Committee Report, *supra* note 8, at p. 219. See also Chatters, *The Effect of the Defense Program on Municipal Government*, NATIONAL TAX ASSOCIATION, PROCEEDINGS OF FORTY-FIFTH ANNUAL CONFERENCE 467 (1953).

Where existing manufacturing properties are transferred to defense production, the same services must be rendered by the municipal government as before, but the tax base is decreased.

Tax immune industrial operations, and the threat thereof, also make economical long term municipal borrowing for schools and capital improvements impossible. Investors are reluctant to purchase municipal bonds, or insist upon high rates of interest because of the unpredictable tax base.

Federal payments to localities in lieu of taxes, to relieve cases of particular hardship, are an unsatisfactory solution to a recognized inequity. Aside from requiring costly Federal administrative machinery where local tax machinery is already set up to do the job, they establish the undesirable possibility of Federal coercion of the localities.[11]

The present concern of local governments is with the so-called partial payment clauses in agreements executed between the Federal government and local manufacturers, by which the already heavy oppression of Federal immunity is sought to be extended by contract to further decrease the tax base. Property worth billions of dollars is covered by this type of contract alone.[12] Such loss is particularly serious since it often comes without any advance warning, so that there is not even opportunity for adjustment in preparation of local budgets. The mere decision of contract procurement officers to permit such clauses to be included in government contracts whenever and wherever they deem it advisable is all that is needed, if Appellee prevails here, to render immune otherwise assessable personalty.

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[11] "The power to confer or withhold unlimited benefits is the power to coerce or destroy." Mr. Justice Roberts in Butler v. United States, 297 U.S. 1, 71 (1936).

[12] Text, *supra* at note 2.

II. The History of the Doctrine of Federal Immunity Shows That It Should Be Applied Only Where Needed as Security Against Unbridled Taxation Without Representation. That Reason Does Not Apply in the Instant Case.

The immunity of the Federal government from state and local taxation was first enunciated in 1819 by Chief Justice John Marshall in *M'Culloch* v. *Maryland*.[13] That case involved a discriminatory state tax specifically designed to hamper the operations of a United States agency, at a time when the local governments were more powerful taxing units than the Federal government. There is no doubt that Marshall's fears for the Federal government were justified when he penned the famous warning that "the power to tax involves the power to destroy."[14]

M'Culloch v. *Maryland* did not, however, lay down a rule banning all local taxation which might adversely affect the Federal government,[15] nor has it been interpreted that broadly by this Court in recent years. Various local taxes assessed against private corporations have been sustained even though their effect was to impose some economic burden on the Federal Government.[16]

The reason for Federal tax immunity was stated by Marshall when he declared the principle of immunity in *M'Culloch*:

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[13] 4 Wheat. 316 (1819).

[14] *Id.* at 431.

[15] In fact, in speaking obiter of a contractor doing business with the Federal government, the Court said: "It is true, that the property of the contractor may be taxed, as the property of other citizens. . . ." *Id.* at 431.

[16] S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946) (tax levied subject to prior rights of government upheld on property where legal title in government but beneficial ownership in private corporation); Esso Standard Oil v. Evans, 345 U.S. 495 (1953); Alabama v. King & Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937).

> "The only security against the abuse of [the taxing] power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation." [17]

Marshall went on to say that since a tax levied on the Federal government is in reality a tax on all the citizens of the United States, no such tax may be levied by a state or local law-making body which does not represent all those citizens.[18]

But this reason does not apply in the instant case, for here there is an effective security against the abuse of the taxing power. The tax levied by the City of Detroit did not discriminate against the Federal government or against Murray. It applied with equal ad valorem force to all city property owners, who were represented in the city's law-making body and through it controlled the taxing power. Any "threat of destruction" to the Federal government would also be a threat of destruction to the hundreds of thousands of property owning voters of Detroit.[19]

III. The Application of the Rule of Federal Immunity in This Case Would Have the Effect of Requiring the People of Detroit to Pay Out of Their Own Pockets for Municipal Services Which Benefit All the People of the Nation.

The contract entered into by Murray in the instant case is sought to be used to avoid payment of the ad valorem personal property tax of the City of Detroit. This attempt rests upon the placing in the Federal government of legal title to goods over which Murray exercised all the incidents of ownership.[20] Thus it is hoped to make Detroit's tax a tax directly on the Federal government rather than what it is, a tax against Murray involving property, the possession and beneficial ownership of which is enjoyed by Murray.

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[17] M'Culloch v. Maryland, 4 Wheat. 316, 428 (1819).

[18] *Id.* at 428, 435.

[19] Of course, the general principle that people who pay taxes are entitled to have a voice in the election of those who pass the laws does not prevent taxing of the property of non-residents since they enjoy the benefits of local sovereignty and local protection of their property. M'Culloch v. Maryland, *supra* note 13, at 429; Thomas v. Gay, 169 U. S. 264, 276 (1898).

Like the many other Detroit taxpayers, Murray used the municipal services such as fire and police protection, street paving and sewage disposal, which this tax was designed to finance. These services increased, of course, as operations expanded with the government contract. To hold the property immune from Detroit's tax would be to force the other Detroit taxpayers to shoulder part of Murray's tax burden, while Murray continued to receive the tax benefit. The Federal government, on the other hand, can command a cheaper price in its contractual negotiations if it is able to impart its tax immunity to its contractors. It can hardly be denied that the refusal of immunity in this case will increase the cost to the Federal taxpayer. But local taxpayers should not be expected to provide municipal services for government manufacturing operations out of their own pockets. "The cost of defense is a 'national' responsibility that should be extended over the complete tax base of the nation. The basic question would seem to be whether or not the cost of national defense should be borne by the whole nation on an equitable basis or whether particular communities because of their industrial abilities should be asked, indeed ordered, to bear more than their fair share."[21]

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[20] See the discussion of these incidents of ownership in Appellants' Brief at pages 57-72.

[21] Deming, *Tax [illegible] U. S. Industrial Property A Problem*, 43 Nat. Mun. Rev. 93 (195[illegible]

IV. The Holding of United States v. County of Allegheny Is Not Controlling Here, and Should Not Be Extended To Allow the Federal Government To Transfer Its Tax Immunity to Private Parties By Contract In This Manner.

United States v. *County of Allegheny*,[22] relied on by the Court of Appeals as controlling in the instant case, was decided at a time of great need on the part of the Federal government for maximum revenues to finance the war effort. It is distinguishable on that ground, and on those pointed out by Appellants' Brief.[23] Furthermore, its language indicating that a tax may not be levied on property where title is in the Federal government has been disregarded, or at least not so broadly interpreted by later decisions.[24]

The *Allegheny* case suggested that any change in the rule that localities may not tax property of the Federal government must await the voice of Congress.[25] It is submitted that without Congressional action that rule may be removed or at least confined to cases where the Federal government has full and actual ownership of the property and not merely paper title sought to be used to avoid paying for the support of local government. The doctrine of immunity was created by this Court through constitutional interpretation and it is within the province of this Court now to define its limits. It should not be applied where the reason for it does not apply.[26]

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[22] 322 U. S. 174 (1944).

[23] Pages 23, 49, 50, 96 and 120.

[24] S.R.A., Inc. v. Minnesota, 327 U. S. 558 (1946); Esso Standard Oil v. Evans, 345 U. S. 495 (1953) (strained distinction that tax not on Federal government because measured by quantity, not value).

[25] *Supra* note 22, at 191.

[26] Mr. Justice Frankfurter has pointed out the error in a conceptual approach to the *M'Culloch* doctrine in Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466, 487 (1939).

. New Cases Should Be Decided in the Light of Present Conditions

A decision in any new case in this field of Federal tax
mmunity must be made against the background of the lo-
al and Federal tax situation as it exists today. Because
f the tremendous growth of the Federal government, both
n property ownership and tax revenues, the threat of de-
truction is no longer to the Federal government because
f local taxing power, but to the local governments because
f unwarranted restriction of their taxing power.

CONCLUSION

For the reasons stated it is respectfully submitted that
he judgment affirmed below should be reversed and the
omplaint dismissed.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Appellee, and THE UNITED STATES OF AMERICA, Intervenor

On Appeal From the United States Court of Appeals
For Sixth Circuit

No. 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioners,

vs

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

On Writ of Certiorari To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF AMICUS CURIAE ON BEHALF OF CITY OF KENOSHA (WISCONSIN)

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INDEX

PAGE

Object of This Brief 2

Nature of City's Interest 2

Restated Questions 2

Argument 3

I. Property owned by a private contractor and used in performing services for the Federal Government is subject to State and local ad valorem taxes 3

II. Taxability is determined by ownership and not "title" 3

III. Ownership in the present case was in the contractor, notwithstanding transfer of "title" to the United States 4

IV. The purpose and effect of the procurement contract was to give the government no more than a *security* title 6

V. The Wisconsin Supreme Court correctly determined similar issues in *American Motors Corp., et al. v. City of Kenosha* (1957), 274 Wis. 315, 80 N. W. 2d 363 7

VI. Consumable materials are taxable in any event 8

VII. Conclusion 9

CITATIONS

Cases:

PAGE

Alabama v. King and Boozer (1941), 314 U. S. 1 3

American Motors Corp., et al. v. City of Kenosha (1957), 274 Wis. 315, 80 N. W. 2d 363 7

Corliss v. Bowers (1930), 281 U. S. 376, 377-8 4

Helvering v. Clifford (1939), 309 U. S. 331 4

James v. Dravo Contracting Company (1927), 302 U. S. 134, 153-61 3

Offutt Housing Company v. Sarpy County (1956), 351 U. S. 253, 262 (footnote 1) 3, 4, 5, 8

S. R. A. Inc. v. Minnesota (1946), 327 U. S. 558 .... 3, 4, 5, 7

United States v. Allegheny County (1944), 322 U. S. 174, 187 .... 3, 4, 5

United States v. Lennox Metal Manufacturing Company (1955, CA-2), 225 F. 2d 302, 317 7

Texts:

42 Am. Jur. 189, 217 (Property, Secs. 4, 40) 4

42 Am. Jur. 215 (Property, Sec. 37) 5

Brown on Personal Property (2d Ed.), Sec. 5 (pp. 6-7) 4

PAGE

26 Fordham L. Rev. 224, "Government Supply Contracts: Progress Payments Based on Costs; The New Defense Regulations" by John W. Whelan 6, 7

96 L. Ed. 263, at 268, Anno.: "Immunity from State Taxation of Independent Contractors with United States or Federal Agencies—Supreme Court Cases" 3

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR SIXTH COURT

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CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF CITY OF KENOSHA (WISCONSIN

OBJECT OF THIS BRIEF

This brief amicus curiae is filed pursuant to Rule 42-4 by the City of Kenosha, a political subdivision of the State of Wisconsin, in support of Appellants, City of Detroit and County of Wayne.

NATURE OF CITY'S INTEREST

The City of Kenosha is respondent in No. 343, *American Motors Corporation et al. vs. City of Kenosha,* presently pending before this court on motion to affirm or dismiss the appeal. The issues in that case are related to the issues in the present case.

RESTATED QUESTIONS

The City of Kenosha believes that the decision in the instant case is governed by the following questions:

(1) Were Michigan personal property taxes levied on an ownership interest of the United States?

The Court of Appeals (6th Circuit) answered yes.

(2) If the answer to question 1 is "yes," then in what articles of personal property did the United States have an ownership interest?

Not answered by the Court of Appeals.

ARGUMENT

I.

PROPERTY OWNED BY A PRIVATE CONTRACTOR AND USED IN PERFORMING SERVICES FOR THE FEDERAL GOVERNMENT IS SUBJECT TO STATE AND LOCAL AD VALOREM TAXES

This principle was established early in the history of the Federal Constitution and has never been seriously questioned. For a discussion of this rule, see: *Anno.*, "Immunity from State Taxation of Independent Contractors with United States or Federal Agencies—Supreme Court cases," 96 L. Ed. 263, at 268; *James v. Dravo Contracting Company* (1937), 302 U. S. 134, 153-61.

Furthermore, the fact that the economic burden of the tax may be passed on to the Federal Government—as in the instant case—is immaterial. *Alabama v. King and Boozer* (1941), 314 U. S. 1, 8-9.

II.

TAXABILITY IS DETERMINED BY OWNERSHIP AND NOT "TITLE"

This court has consistently held that federal immunity from local *ad valorem* taxes depends upon the government's "ownership interest" rather than title. *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, 261-2 (Footnote 1); *S. R. A. Inc. v. Minnesota* (1946), 327 U. S. 558; *United States v. Allegheny County* (1944), 322 U. S. 174, 187. Consider the following:

> "Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interests created * * *. The Government may have 'title,' but only a paper title * * *." *Offutt Housing Co. v. Sarpy County, supra,* at 261.

> "It [federal immunity] should be sufficiently flexible to subject real private rights, disentangled from federal policies, to state taxation * * *. Ownership of the beneficial interest has passed to the petitioner with legal title retained by the United States for security purposes." *S. R. A. Inc. v. Minnesota, supra,* at 569-70.

> "We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner." *United States v. Allegheny County, supra,* at 187.

The same rule has been applied in other fields of taxation. See: *Corliss v. Bowers* (1930), 281 U. S. 376, 377-8; *Helvering v. Clifford* (1939), 309 U. S. 331, 335, 337.

III.

OWNERSHIP IN THE PRESENT CASE WAS IN THE CONTRACTOR, NOTWITHSTANDING TRANSFER OF "TITLE" THE UNITED STATES

Property, in the legal sense, means not the thing itself, but rather the *incidents of ownership* which inhere in it. *Brown on Personal Property (Second Edition),* Sec. 5 (pp. 6-7); *42 Am. Jur. 189, 217,* (Property, Secs. 4, 40).

Under the procurement contract in the instant case, Murray Corporation retained substantially all incidents of ownership in the property in question (i.e. raw materials, supplies, work in process, and completed parts), including the risk of loss and rights of possession. use and disposition. In other words, notwithstanding the passage of "title," the contract so effectively reserved all incidents of ownership to the contractor that the government acquired no substantial ownership interest. The fact that the government acquired "title" and contractual controls "as a regulatory mechanism" does not in itself create an ownership interest. *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, 261; *S. R. A. Inc. v. Minnesota* (1946), 327 U. S. 558.

In order for the government to acquire a true ownership interest, its "title" must be buttressed by some of the normal incidents of ownership as was the situation in *United States v. Allegheny County* (1944), 322 U. S. 174. In that case, the government—and not the contractor—retained the risk of loss and right of disposition. Thus, *42 Am. Jur. 215* (Property, Sec. 37) states that:

> "He is the owner of property who, in the case of its destruction, must sustain the *loss* of it" (italics added).

In addition to vesting the contractor with practically all incidents of ownership, the procurement contract in the present case even contained a reversion of "title" clause in respect to property not delivered to and accepted by the government. It is obvious that the government never intended to acquire ownership of materials, supplies, work in process, and parts *unless* and *until* they were incorporated into finished products and accepted by government inspectors.

IV.

THE PURPOSE AND EFFECT OF THE PROCUREMENT CONTRACT WAS TO GIVE THE GOVERNMENT NO MORE THAN A *SECURITY* TITLE

An exhaustive article on government supply contracts appears in *26 Fordham L. Rev.* 224 under the title of "Government Supply Contracts: Progress Payments Based on Costs; The New Defense Regulations." The author, Professor John W. Whelan,* was an instructor in the Army's Judge Advocate General School at Charlottesville, Virginia, from 1951 to 1955 and was principal author of the Army Special Text, "Army Procurement Law, 1955."

As shown by Professor Whelan's article, the purpose of progress and partial payments, such as were used in the instant case, is to provide *financing* for the contractor (pp. 225-7 of *26 Fordham L. Rev.*). Under long-established rules and regulations, a paramount lien or "title" is customarily granted to the government (pp. 231-3 of *26 Fordham L. Rev.*). This procedure is designed to protect the government "against the danger of loss of appropriated funds * * *" (p. 232 of *26 Fordham L. Rev.* Footnote 34).

After a detailed analysis of "title-vesting" and related contract clauses (substantially the same as those in the instant case), Professor Whelan states:

> "One is prone to conclude that the Government's title is a tentative one, something more nearly a *security* device than the title of an owner" (p. 256 of *26 Fordham L. Rev.*, italics added).

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> "The analysis of subparagraph (d) [of the Progress Payments clause] * * * seems to be weighted on the side of a declaration that the government acquired no title (except perhaps some sort of *security* interest) to property subject to the 'Progress Payment' clause. To this conclusion the author inclines" (p. 263 of 26 *Fordham L. Rev.*, italics added).

The Court of Appeals of the Second Circuit has referred to the government's claim of [illegible] "title" under such a clause as

> "Essentially, the enforcement of [illegible] lien on the defendant's property" (*United States v. Lennox Metal Manufacturing Company* [illegible] 1955 CA-2), 225 F. 2d 302, 317).

The acquisition of security title by the government does not, of course, create an "ownership interest" in the government so as to preclude local taxation. *S. R. A. Inc. v. Minnesota* (1946), 327 U. S. 558.

V.

THE WISCONSIN SUPREME COURT CORRECTLY DETERMINED SIMILAR ISSUES IN *AMERICAN MOTORS CORP., ET AL. V. CITY OF KENOSHA* (1957), 274 Wis. 315, 80 N. W. 2d 363

In that case, now pending in this court (No. 34[illegible]) on motion to affirm or dismiss, the Wisconsin Supreme Court determined the effect of "title-vesting" clauses similar to those found in the instant case. After determining that Federal and Wisconsin law are alike on this question (p. 320 of 274 Wis.), the Wisconsin court applied the rule of

Offutt Housing Company v. Sarpy County (1956), 351 U. S. 253, 261, that the court may disregard a paper title and ascertain the "nature of the real interests created." It found that the contractor had retained substantially all incidents of ownership and was the true owner for local property tax purposes, notwithstanding the passage of "title."

VI.

CONSUMABLE MATERIALS ARE TAXABLE IN ANY EVENT

If the court recognizes an "ownership interest" in the government—a recognition which we contend cannot be given under the facts—then we submit that the equipment and materials used by the contractor and not incorporated into the finished product are taxable in any event. The full economic use of such items is vested in the contractor and will never be turned over to the government. The government has acquired "title" to these *excess* items solely as a *security* device. As such, it acquired no "ownership interest." See *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, where a private ownership was established for local tax purposes on the basis of a 75-year leasehold interest in housing units having a 35 year life.

VII.

CONCLUSION

The decision of the lower court should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM 195~~6~~7

No. [redacted] ~~368~~ 34

CITY OF DETROIT,
a Michigan Municipal Corporation,

and

COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Petitioners and Defendants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Respondent and Plaintiff,

and

THE UNITED STATES OF AMERICA,
Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT and APPENDIX

LIST OF ATTORNEYS

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corporation, Petitioner,
By PAUL T. DWYER,
Its Corporation Counsel,
BERT R. SOGGE,
VANCE G. INGALLS,
JULIUS C. PLISKOW,
G. EDWIN SLATER,
Assistants Corporation Counsel,
and
COUNTY OF WAYNE, a Michigan Constitutional
Body Corporate, Petitioner,
By GERALD K. O'BRIEN,
Prosecuting Attorney and
HOBART TAYLOR, JR.,
PHILIP A. McHUGH,
THOMAS J. FOLEY, JR.,
Assistants Prosecuting Attorney,
and
ALBERT E. CHAMPNEY,
Of Counsel.

TABLE OF CONTENTS

Page
Opinions Below 2
Jurisdiction 2-3
Questions Presented For Review 3-4
Statutes, Regulation and Charter 4-5
Statement of the Case 5-7
What this Case Does Not Involve 7-8
Reasons for Granting the Writ 8-15
Appendix A—Statutes, Regulations, and Charter Provisions 1a-8a
Appendix B—Judgment and Opinion of Court of Appeals 9a

AUTHORITIES CITED

Alabama v. King and Boozer, 314 U. S. 1 12, 13
Esso-Standard Oil v. Evans, 345 U. S. 495 13
Girourard v. United States, 328 U. S. 61 15
Graves v. New York, 306 U. S. 466 12, 13
Helvering v. Mountain Producers, 303 U. S. 376 13
James v. Dravo Contracting Co., 302 U. S. 134 12, 13
Kern-Limerick and United States of America v. Scurlock, 347 U. S. 110 13
McCullough v. Maryland, 4 Wheat. 579 14
Murray Corp. v. City of Detroit, 132 F. Supp. 899 2
Murray Corp. v. City of Detroit, 234 F. 2nd 380 2
New Brunswick v. United States, 276 U. S. 547 12, 13
Oklahoma Tax Comm. v. Texas Co., 336 U. S. 342 12
Offutt Housing Corp. v. Sarpy County, 351 U. S. 253 12, 14-15
S. R. A. v. Minnesota, 327 U. S. 558 12, 13
United States v. Allegheny County, 322 U. S. 174 13

STATUTES, REGULATIONS, ETC.

	Page
R. S. 3648, 31 U. S. C. A. 529	4
C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (1))	3
28 U. S. C. A. 1331, 1332	2
C. 646, 62 Stat. 961 (28 U. S. C. A. 2101(c))	3
C. 65, 62 Stat. 21 et seq. (41 U. S. C. A. Sec. 151)	4
C. 288, Title III §305, 63 Stat. 396 (41 U. S. C. A. 255)	4
Procurement Regulations 5.407.2 (1), 12 F. R. 7693	5
Sec. 211.1 C. L. 1948 (7.1 M.S.A.)	5
Sec. 1, Ch. IV, Title VI, Charter, City of Detroit	5
Sec. 26, Ch. IV, Title VI, Charter, City of Detroit	5

IN THE

upreme Court of the United States

OCTOBER TERM 1956

No. 401

CITY OF DETROIT,
a Michigan Municipal Corporation,

and

COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Petitioners and Defendants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Respondent and Plaintiff,

and

THE UNITED STATES OF AMERICA,
Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT and APPENDIX

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled consolidated cause on June 16, 1956.

(A) OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, appears in 234 F. 2nd 380. A copy of the Judgment and Opinion of the Court are attached hereto as Appendix B. Opinion of Hon. Thomas P. Thornton, District Judge for Eastern District of Michigan, is reported in 132 F. Supp. 899; same is not attached being contained in copies of Joint Appendix printed for the court below, nine copies of which have been filed with this Court. Rule 23 (iii) (i).

(B) JURISDICTION

(i) These suits were brought and original jurisdiction invoked by respondent, and plaintiff Murray, under 28 United States Code, Sections 1331 and 1332, respectively.

(ii) Two suits for recovery of first and second half installments of the disputed City personal property tax together with a third action against the County of Wayne were consolidated on appeal and all disposed of together by judgment in the United States Court of Appeals, Sixth Circuit. June 16, 1956, in Cause No. 12678. An Order of this Court was entered on September 15, 1956, extending the time for filing petition for writ of certiorari to and including November 13, 1956.

(Prior thereto, petitioners herein filed notices of appeal from said judgments on July 25, 1956 and their jurisdictional statement presenting grounds in support of direct appeal was filed in this Court on September 10, 1956. The present petition is filed without waiver of the position taken in such proceedings in view of the Court's deliberation over the questions of jurisdiction raised by motions to dismiss or affirm and brief in opposition to such motions. Pending determination of such jurisdictional questions by the Court, petitioners seek ultimate review and hearing by certiorari should the appeal procedure be deemed ineffectual.)

(iii) Jurisdiction of this Court to issue a writ of certiorari is conferred by C. 646, 62 Stat. 928 (28 U. S. C. A. 1254 (1); C. 646, Stat. 961, as amended by C. 139, §106, 63 Stat. 104 (28 U. S. C. A. 2101 (c)).[1]

(C) QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Did United States contract procurement officers have authority under Federal law to provide for transfer of title to the United States of materials in the possession of plaintiff (an independent sub-contractor under Federal government prime contracts) upon plaintiff's receipt of partial payment therefor from its prime contractors, thereby causing invalidation of state and local taxing statutes and non-discriminatory ad valorem personal property taxes[2] levied thereunder against plaintiff upon such materials as repugnant to the implied constitutional immunity of the United States?

---

[1] The issues raised being identical, this Petition is intended to apply to all three cases in conformance with Rule 15 (3).

[2] This case is novel in that the Supreme Court has never passed on the validity of an ad valorem personal property tax against private parties having in their possession personal property, title to which is purported to be in the United States.

2. If inclusion of transfer of title provisions in subcontracts under Federal contracts was authorized by Federal statutes,—were the undisputed facts and course of conduct between the contracting parties nevertheless inconsistent with claim of absolute title in the government to materials acquired for processing by plaintiff, creating instead paper title for security purposes which would not invalidate state and local statutes or non-discriminatory ad valorem personal property taxes levied thereunder as repugnant to the implied constitutional immunity of the Federal government?

3. If inclusion of such partial payment-title passage provisions was authorized by Federal statutes and vested absolute and not paper or security title to such materials in the Federal government,—then were state and local statutes and non-discriminatory ad valorem taxes levied thereunder (the incidence of which was not against the government and for which plaintiff alone is liable for payment and collection) nevertheless valid as imposing no direct burden upon the Federal government in violation of its implied constitutional immunity?

(D) STATUTES INVOLVED

Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix A attached hereto.

Armed Services Procurement Act of 1947, Public Law of 80th Congress, C. 65 §2, 62 Stat. 21 *et seq.*, as amended, 41 U. S. C. A. Sec. 151 *et seq.*;

R. S. 3648, 31 U. S. C. A. 529;

C. 288, Title III, §305, 63 Stat. 396, as amended, 41 U. S. C. A. Sec. 255;

Procurement Regulations, 12 F. R. 7693;

Sec. 211.1 C. L. Mich. 1948;

Sec. 1, Chapter IV, Title VI, Charter of City of Detroit;

Sec. 26, Chapter IV, Title VI, Charter of City of Detroit.

(E) STATEMENT OF THE CASE

The matter here presented involves an appeal of three consolidated causes brought by plaintiff-respondent to recover personal property ad valorem taxes levied by defendants-petitioners based on a common assessment as of January 1, 1952 upon personal property in plaintiff's possession in its plant at Detroit, Michigan, procured and being processed for parts and components of aircraft and aircraft engines to be delivered to Kaiser Manufacturing Company and to Curtiss-Wright Corporation, respectively. The latter were prime contractors with the United States Air Force and were engaged in the manufacture of airplanes for the United States Air Force.[3]

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[3] Plaintiff's sub-contract with Kaiser consisted of a letter of intent executed March 23, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended Aug. 15, 1951 and again on Oct. 4, 1951, under Kaiser's letter Prime Contract No. AF 33(038)-18481 with the United States Government entered into Dec. 20, 1950 and subsequently amended.

Plaintiff's other sub-contract with Wright was likewise a letter of intent executed April 19, 1951 for the manufacture of certain parts and sub-assemblies therein specified, amended on May 24, 1951, under Wright's Prime Contract No. AF 33(038)-18132 with the United States Government entered into Dec. 12, 1951 and subsequently amended.

The letter prime contract between Wright and the latter referred to a so-called Basic Agreement No. 1 and made it a part of the contract between them. Superseding definitive sub-contracts and prime contracts were not agreed upon nor made effective until after the assessment date here in question.

Subsequent to execution of the respective letter subcontracts, the prime letter contracts were amended to provide for inclusion of partial payment provisions in plaintiff's sub-contracts, together with the clause in controversy here that upon making of any such partial payment, title to all parts, materials, inventories, work in progress and non-durable tools, theretofore or thereafter acquired or produced for performance of such contract shall forthwith vest in the Government.

Despite right to approve provisions incorporated into these sub-contracts, each separate document contained a disclaimer of obligation on the part of the Government to the sub-contractor.

Pursuant to Charter of the City of Detroit, Title VI, Chapter IV, Section 1, the assessment in question was made against plaintiff Murray as the person in possession of the subject property. This is illustrated by defendant's Exhibit 3, consisting of a portion of the City personal property assessment roll. On the line applicable to said property, Murray Corporation was named as taxpayer and there also appeared the notation "assessed subject to prior rights of Federal Government."

The agreed upon dollar valuation of personal property so assessed on January 1, 1952 is $2,043,670.00. The claim of plaintiff against defendant City is in the total sum of $67,714.96 and against defendant County in the sum of $12,572.66 for tax year 1952, exclusive of interest from date same was paid under protest prior to commencement of the several actions herein.

The United States petitioned for leave, and was allowed to intervene, claiming ownership of the property on which the assessment was based and an interest in the litigation.

Prior to hearing of plaintiff's motion for summary judgment depositions were taken at defendants' request; records of plaintiff Murray were examined and stipulations prepared, executed and filed to the end that the matter could be submitted to the District Judge upon undisputed facts for his determination as a matter of law based upon the pleadings, stipulations, depositions and exhibits.[4]

Judgment for plaintiff-respondent in each of the cases was entered on June 29, 1955, pursuant to an opinion filed by the District Judge. (Joint Appendix, pp. 112-122.)

Following oral argument on appeal taken, judgment of the Court of Appeals, Sixth Circuit, was entered on June 16, 1956 based on its opinion affirming the judgments of the District Court in the three cases. Notice of Appeal was filed in each instance with the Court of Appeals, Sixth Circuit, on July 25, 1956. At the date of drafting this petition, the propriety of direct appeal has not been resolved.

WHAT THIS CASE DOES NOT INVOLVE

1. Tools already owned and furnished by the United States Government to plaintiff, under a separate facility contract, were not assessed and therefore are not involved.

2. Tools completed by plaintiff prior to January 1, 1952 were not assessed and are not a subject of this suit.

3. The tax does not include any assessment against real estate.

4. The tax here is not a privilege or specific tax but an ad valorem non-discriminatory property tax.

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[4] The printed record in the Court of Appeals was in the form of a Joint Appendix, nine copies of which have been filed with the clerk of this Court.

5. No claim was made that the tax imposed a lien on the subject personal property which would conflict with any prior rights of the Government.

6. The matter does not involve the judgment of a State Court.

REASONS FOR GRANTING THE WRIT

1. Pending Litigation

The issues involved in this case are similar to litigation in other jurisdictions from coast to coast contesting validity of local taxes on the ground that title to the subject personal property had been transferred to the United States before delivery.

The agreed dollar valuation of Murray Corporation's personal property so assessed on January 1, 1952 was $2,043,670 and judgments against defendant City total $67,714.96 and against defendant County $12,572.66, respectively. In addition, plaintiff has other similar actions pending in the District Court for 1953 and 1954.

Likewise 3 other Detroit taxpayers represented by plaintiff's counsel herein have a total of 5 cases pending in the District Court and 9 others have a total of 25 cases involving the same or similar legal issues, now pending in the Wayne County Circuit Court against defendant City awaiting ultimate determination of this proceeding with perhaps half that number brought against defendant County.

The overall amounts affecting defendants City and County, total $3,834,524.00[5] for the years 1952 through

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[5] This includes taxes which the City Treasurer receives as collection agent for the Detroit Board of Education.

1956. New cases are being filed annually so long as contracts continue to be let by the Government with the partial payment-title passage clauses here in question.

The problem will likely remain a continuing source of litigation unless and until determined by this Court.

2. Effect on United States and Local Communities

As important as the large sums involved in the many States where these contests are pending is the questioned construction by the Court of Appeals of the Armed Services Procurement Act of 1947, upholding provisions in procurement contracts whereby the Government purports to take title directly to material, in the course of being manufactured by independent sub-contractors, before delivery of the supplies contracted for by the prime contractor. For such extension of the doctrine of implied constitutional immunity to private independent contractors by the Court below nullifies local tax laws and ignores the protection afforded the Government by the careful manner in which the assessment herein was made.

Important public interest, national [illegible] local, therefore suggests that this matter should be heard, considered and decided on the merits by this Court.

Reflecting the concern felt by the Goverment regarding the questions being raised, the following view was expressed in the Brief and Appendix (p. 34) filed in the District Court below by the United States:

> "Also, as the Court knows from statements made at the oral argument, recently the Government has been presented with the same basic problem in other jurisdictions. The number of contracts, as well as the amounts involved, is substantially greater than here. No doubt, some of the same arguments will be advanced. Until an authoritative decision has

> been rendered by a federal court on which is essentially, a federal question, the problem remains a fairly critical one to the Government and its procuring agencies."

Similar concern was indicated by appellee Murray Corporation by its opening statement in its main brief filed in the District Court:

> "This case is of national importance."

The District Court in this case pointed out (132 F. (2d) 899, at 900):

> "The Court is not unmindful of the effects of its decision in this matter. The Court has been advised that there are many actions in this geographical area that have been commenced, or are about to be commenced, involving the issue which we are here called upon to resolve, and that the aggregate of taxes involved may well be in the neighborhood of two million dollars."

Representatives of the United States Air Force stated that—

> "partial payment clauses with provisions vesting the title in the United States have been included in upwards of 80% of fixed price prime and subcontracts for the production of aircraft for the United States, by contract, and in substantially a greater percentage of contracts, dollarwise." (Stipulation No. 2, paragraph (2); Joint Appendix (86).)

The possible nation-wide value of materials in the hands of private contractors doing Federal contract work immunized from personal property taxation by virtue of partial payment-title transfer clauses in such contracts was estimated by United States Bureau of the Budget as approximately $4,900,000,000 as of June 30, 1953. This appears in report of "Hearings before Sub-Committee on Legislative Program of the Committee on Government Operations," United States Senate—83rd Congress—2nd Session, June 2 and 3, 1954 (pp. 42-53). The resulting tax loss depends, of course, on the assessment percentages and rates in each taxing district and any fluctuation in amount of such materials in the hands of contractors each year on the various local tax dates.

In many States and communities no personal property taxes are assessed, but some form or forms of privilege or specific taxes are usually substituted in their place, which types of taxes have been held valid by this Court when the responsibility for their payment is directly on the contractor and not on the government.

The Commission on Inter-Governmental Relations, appointed by the President, upon authority conferred by federal act, has recognized the increase in Federal holdings of real and personal property including personalty[6] in the hands of private contractors, claimed immune as in the case herein by virtue of title passing provisions, with its consequent serious effect on local taxation and has noted that the greatest increase has been in urban areas.

Need exists for full as well as final decision whether such non-discriminatory personal property ad valorem taxes may be levied against plaintiff Murray Corporation on inventory acquired and being processed as a sub-contractor for eventual delivery to prime contractors and by the latter to the United States Air Force under separate prime contracts.

Until this Court ultimately determines the questions of authority for inclusion of said provisions in these subcontracts, together with their proper construction and effect on local tax laws, uncertainty continues in the national scene as well as at local levels of government.

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[6] Hearings before the Committee on Government operations, United States Senate, 84th Congress, 1st Session, July 25, 1955, Appendix II (p. 200).

3. Important Issues Left Unanswered by Lower Court

The error of the United States Court of Appeals in invalidating the State statute herein consists chiefly of failure to examine the facts and circumstances of the present case together with rights and obligations of plaintiff under its sub-contract as the Supreme Court has done in *New Brunswick v. United States*, 276 U. S. 547; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. New York*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma State Tax Comm. v. Texas Co.*, 336 U. S. 342.

Overlooked by the opinion of the Court of Appeals are certain facts and an admitted course of conduct urged by defendants as grounds for their contention—that the provisions for taking of title were for security purposes only, a mere paper title. *(Offut Housing Corp. v. Sarpy County*, 351 U. S. 253, 261.) Nor was cognizance taken of defendants' contention that a non-discriminatory personal property tax against an independent contractor "assessed subject to prior rights of the Federal Government" and collectible as a debt against such contractor is valid in that no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government. Thus, impliedly disapproved was the mode of assessment which defendants followed here within the rule laid down by this Court in such cases as *S. R. A. v. Minnesota*, 327 U. S. 558 and *New Brunswick v. United States*, 276 U. S. 547, 556.

Neither did said Court consider the effect of finality of State Court decisions on whether responsibility for payment of the taxes in question fell solely on plaintiff and not the Government. *Alabama v. King & Boozer, supra; Kern-Limerick v. Scurlock,* 347 U. S. 110, 121.

4. Reappraisal Urged of Constitutional Immunity Doctrine

The mere finding that this is an ad valorem property tax on personal property of the government in the hands of a private party is not just cause for nullifying it, as the Court below did on the authority of *United States v. Allegheny County,* 322 U. S. 174.

We urge upon the Court the desirability—perhaps the necessity— of now reappraising its decision in *Allegheny supra,* if it may not be distinguished—with such help as counsel herein are able to provide in briefs on the merits and in oral arguments, to determine whether it is in conflict with and unsustainable under the theory of "incidence" or "direct burden" of a tax under the constitutional immunity doctrine as firmly established by such decisions as: *James v. Dravo,* 302 U. S. 134, 114 A. L. R. 318; *Helvering v. Mountain Producers,* 303 U. S. 376; *Graves v. New York,* 306 U. S. 466; *Alamaba v. King & Boozer,* 314 U. S. 1; *Esso Standard Oil Co. v. Evans,* 345 U. S. 495; *New Brunswick v. United States, supra;* and *S. R. A. v. Minnesota, supra,* and others.

Under the facts and circumstances presented by this case, these former decisions of this Court wherein the true principle of "incidence of the tax" has been enunciated are, we maintain, pertinent.

We respectfully suggest that the entire subject of constitutional immunity can be clarified and rendered possible for future consistent use by this and inferior courts by proper application of the rule laid down by Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheat. 579 at p. 609, to any and all types of taxes (ad valorem as well as specific) namely:

If the tax "RETARDS, IMPEDES, BURDENS, OR IN ANY MANNER CONTROLS THE OPERATIONS OF * * * THE POWERS VESTED * * * IN THE GENERAL GOVERNMENT" then it is bad. If not it is good.

In this spirit, it was suggested to the Supreme Court in the *Dravo* case, *supra*, that it restrict the rule of tax exemption so that a private person who sells to or contracts with the Government cannot claim the immunity against taxation which properly belongs to the sovereign alone. (See *Amicus Curiae*—Brief of Solicitor General, and Attorney General pp. 2-3, *James v. Dravo, supra.*) It is our contention that to uphold such restriction here would fit within Chief Justice Marshall's rule or theory of the doctrine of implied constitutional immunity and logically validate the tax laws and taxes here involved.[7]

The fact that this Court has been divided in its opinions in most governmental immunity cases from *Dravo, supra*, to the most recent case of *Offutt Housing Corp. v. Sarpy*

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[7] Chief Justice Marshall was attempting to resolve a conflict between the Federal government and a State, involving the whole philosophy of State v. Federal power. Before him was the studied and deliberate attempt by a State to destroy a Federal instrumentality by the levy of a discriminatory "political" tax leveled exclusively at the branch of the United States bank established in Maryland. (Argument of Pinckney in *McCullough*, 4 Wheat. p. 598.)

It is noteworthy that the Chief Justice was careful to except from the effect of his opinion in McCullough non-discriminatory taxes (property taxes included) 4 Wheat. 609. We contend and would like the opportunity to present our views that a true interpretation of that opinion with such exception must logically, legally and equitably lead to the inevitable conclusion that the tax laws and taxes now before this Court should be validated.

ounty, 351 U. S. 253, is eloquent testimony to the need or reestablishment of a sound and universally applicable nterpretation of the immunity doctrine which will clarify he matter both for the Government, the contractors conerned and local taxing bodies

The Court granted Certiorari on the ground that re-exmination of the subject there appeared warranted in *irourard v. United States,* 328 U. S. 61, 63.

It is our contention, ~~which~~ we would like to develop nore fully in briefs and argument at the earliest opporunity convenient to the Court, that these non-discriminaory taxes here involved, assessed against a private corporation for payment of which such corporation is solely esponsible, and which place no burden upon the governnent, except such as the government may have assumed y its contracts with the taxpayer (plaintiff) are and hould be equally as valid as the taxes involved in *Dravo, ing-Boozer, New Brunswick, S. R. A. etc., supra.* We believe accordingly that the Federal questions presented by his petition are substantial, that they are of wide public mportance, and to bring an end to continuing litigation hould be considered by this Court on briefs and with oral rgument on their merits.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CITY OF DETROIT, a Michigan
municipal corporation, Petitioner,
By PAUL T. DWYER,
Its Corporation Counsel,
BERT R. SOGGE,
VANCE G. INGALLS,
JULIUS C. PLISKOW,
G. EDWIN SLATER,
Assistants Corporation Counsel,
and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Petitioner,
By GERALD K. O'BRIEN,
Prosecuting Attorney and
HOBART TAYLOR, JR.,
PHILIP A. McHUGH,
THOMAS J. FOLEY, JR.,
Assistants Prosecuting Attorney,
and
ALBERT E. CHAMPNEY,
Of Counsel.

November 10, 1956.

APPENDIX A

STATUTES, REGULATIONS, CHARTER PROVISIONS

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.

§151. PURCHASES and contracts for supplies and services—(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics, (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necesary in the public interest during the period of a national emergency declared by the President or by the Congress;

* * * * *

(10) for supplies or services for which it is impracticable to secure competition;

* * * * *

§153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151 (c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(c) All contracts negotiated without advertising pursuant to an authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Feb. 19, 1948, c. 65, §4, 62 Stat. 23; Oct. 31, 1951, c. 652, 65 Stat. 700.

§154.

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shal be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provisions for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree. Feb. 19, 1948, c. 65, §5, 62 Stat. 24.

31 U. S. C. A. 529; R. S. §3648; Aug. 2, 1946, c. 744, 60 Stat. 809

§529. ADVANCES OF PUBLIC MONEYS; PROHIBITION AGAINST

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

41U. S. C. A. 255. (June 30, 1949, c. 288, Title III, §305, 63 Stat. 396)

§255. ADVANCE PAYMENTS ON NEGOTIATED CONTRACTS; GOVERNING TERMS

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provisions for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special acount in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

(APR 5—407.2(1))

"Partial Payments—Partial payments, which are hereby defined as payments prior to acceptance on work in progress for the Government under this contract, may be mad upon the following terms and conditions.

"(a) The Contracting Officer may, from time to tim authorize partial payments to the Contractor upon property acquired or produced by it for the performance o this contract: Provided, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the Property upon which payment is made which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract exceed 80 percent of the total amount authorized to be expended under paragraph 5 of this Letter Contract.

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production; Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder, or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts, and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Clause shall vest in the Contractor.

"(e) The provisions of this contract referring to 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Clause. The provisions of this Clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

"(f) It this contract (as heretofore or hereafter supplemented or amended) contains provisions for Advance Payments and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments clause any unliquidated balance of advance payments is outstanding, then notwithstanding any other provisions of the Advance Payments Clause of this contract the net amount, after appropriate deduction for liquidation of the advance payment of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Clause, and shall thereafter be withdrawn only pursuant to such provisions."

Compiled Laws of Michigan 1948, 211.1 (7.1 MSA)

"Property subject to taxation. Section 1.—*The People of the State of Michigan enact,* That all property, real and Personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Section 1, Chapter IV, Title VI, Charter of the City of Detroit, 1918 (1952 Ed.)

"* * * The owners or persons in possession of any personal property shall pay all taxes assessed thereon."

Section 26, Chapter IV, Title VI, City Charter, 1918 (1952 Ed.)

"On and after the 26th day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other that real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. 'Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining thereafter shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid and no transfer of the personal property assessed shall operate to divest or destroy such lien."

APPENDIX B

JUDGMENT AND OPINION OF COURT OF APPEALS

CAUSE ARGUED AND SUBMITTED

June 4, 1956

(Before Allen and Martin, Circuit Judges, and Starr, District Judge.)

This cause is argued by Thomas J. Foley for County of Wayne, by Julius Pliskow for The City of Detroit, appellants; by Victor Klein for The Murray Corporation, and Lyle M. Turner for The United States, appellees, and is submitted to the court.

JUDGMENT

Entered June 16, 1956.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the several judgments of the said District Court in this cause be and the same are hereby affirmed.

NOTE:

Eight attatched pages appearing at this point are at beginning of next card

14

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956 7

No. ~~562~~ 36

CITY OF DETROIT,
a Michigan Municipal Corporation,

and

COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Petitioners and Defendants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Respondent and Plaintiff,

and

THE UNITED STATES OF AMERICA,
Intervenor

ON PETITION FOR WRIT OF CERTIORARI TO
ON ~~APPEAL FROM~~ THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

(For List of Attorneys see inside front cover.)

International Print & Record Co., 642 Beaubien St., Detroit 26, Michigan

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INDEX

Page

Conflict of Decisions.......................... 3

State Laws Invalidated.......................... 4

Government's Position Inconsistent................ 6

CITATIONS

Alabama v. King & Boozer, 314 U. S. 1............ 4

City of Detroit v. Gray, 314 Mich. 516, 22 N. W. 2nd 771 4

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289 5

Detroit Shipbuilding Co. v. City of Detroit, 228 Mich. 145, 199 N. W. 645, 135 A. L. R. 597.... 4

Federal Land Bank v. Bismarck, 314 U. S. 95, 99.... 4

Kern-Limerick and U. S. v. Scurlock, 347 U. S. 110, 121 4

S. R. A. v. Minnesota, 327 U. S. 558, 565............ 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

◆

No. 563

◆

CITY OF DETROIT,
a Michigan Municipal Corporation,

and

COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Petitioners and Defendants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Respondent and Plaintiff,

and

THE UNITED STATES OF AMERICA,
Intervenor

◆

ON PETITION FOR WRIT OF CERTIORARI TO
~~ON APPEAL FROM~~ THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

◆

REPLY BRIEF OF PETITIONERS

◆

COPY

(FILED)
(JUNE 16, 1956)
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NO. 12678

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CITY OF DETROIT and COUNTY OF WAYNE, Appellants v. THE MURRAY CORPORATION OF AMERICA, a Delaware corporation, Appellee, and UNITED STATES OF AMERICA, Intervenor	Appeal from the United States District Court for the Eastern District of Michigan.

the reason that the Government claimed ownership of the personal property upon which the tax assessments were made by the City and the County respectively. Concededly, no genuine issue on any material fact was presented, and therefore summary judgment was the proper proceeding for disposition of the issues of law involved.

The assessment of more than $2,000,000.00 in controversy was made against The Murray Corporation of America on personal property in its possession under two letter sub-contracts respectively with "Kaiser" Corporation and "Wright" Corporation, each under and pursuant to letter prime contracts between the United States Government and Kaiser and Wright corporations respectively. These letter sub-contracts covered the manufacture of specified parts and assemblies required under the prime contracts for the United States Air Force for the national defense. These sub-contracts and amendments thereto were approved by a contracting forthwith upon such acquisition or production.

The assessment date under Michigan law with which we are concerned was January 1, 1952. During 1951, the Murray Corporation upon its several requests, audited and approved by a contracting officer of the United States Air Force, received partial payments from Kaiser of more than $163,000.00 and from Curtis Wright (successor to Wright Aeronautical Corporation) of more than $510,000.00.

In his clear-cut opinion, District Judge Thornton analysed the respective positions of the contending parties. The important points m ade by Murray were that the taxes assessed were ad valorem taxes upon property and not privilege taxes assessed against the taxpayer; that property owned by the federal Government is immune from local ad valorem property taxes; that a federal question is presented for determination under federal and not under state law; that the partial payment clauses vesting the partial payment and transfer of title clause was not authorized nor in conformity with federal statutes; that the inclusion of the clause would not defeat an ad valorem tax on personal property in the hands of an independent sub-contractor acquired in the course of carrying out the provisions of a sub-contract for defense production; and that the course of action and dealing with the property was inconsistent with the vesting of absolute title in the United States and the Government therefore acquired merely a lien or title for security purposes leaving Murray vested with an equitable title to the personal property subject to an ad valorem property tax.

The County of Wayne took the same position assumed by the City of Detroit with the added contention, which is clearly not meritorious, that the Murray Corporation is not the real party in interest.

We agree with the finding of the District Court that the partial payment clauses are not invalid for want of authority material aspect distinguishable from the facts encountered here. In the *Allegheny* case, the United States made a contract with a machine company in Pennsylvania for the manufacture of large field guns. The private corporation's plant though used for the manufacture of heavy machinery was not equipped for the manufacture of ordinance. It was agreed that certain additional machinery required for the work should be furnished at Government expense and should remain property of the United States. In performance of the agreement the contractor manufactured one machine, the Government furnished eight gun-boring lathes and the rest of the needed equipment was purchased by the contractor from other machine tool manufacturers. The machinery bought or built by the manufacturer was inspected and accepted on behalf of the United States which compensated the contractor therefor. The contract provided that the title to all such property should vest in the Government upon delivery at the site of work and upon inspection and acceptance. The Government leased the equipment to the contractor during the immune from taxation, either as against the Government itself or as against one holding the property as bailee. The judgment of the state supreme court was reversed as violative of the federal Constitution.

Upon analysis, we think that substantially all of the arguments advanced by appellant were rejected by the Supreme Court in the Allegheny case. The Supreme Court declared that the principle is unshaken, indeed rarely questioned, that "possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." 322 U. S. 177.

In the earlier case of United States v. Ansonia Brass & Copper Company, 218 U. S. 452, the Supreme Court had held that vessels in course of construction for the United States, the title to which under the contract vests in the Government as fast as constructed, became instrumentalities of the Government and for sponsible to the vendor for payment of the purchase price.

We think that reliance of the City of Detroit upon the following cited authorities is not well placed: *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; James v. *Dravo Contracting Co.*, 302 U. S. 134; *Graves v. New York*, 306 U. S. 466; and *Helvering v. Mountain Producers Corporation*, 303 U. S. 376. All of these cases involve excise or privilege taxes, where a privilege exercised by the contractor was taxdd to him although the economic burden was passed along by him to the Government. The incidence of the privilege taxes was upon the contractor while in the case at bar an ad valorem property tax had been assessed upon property the title to which is vested in the United States and the incidence of the tax is directly and solely upon the property assessed.

In the *Esso Standard Oil Company* case the Government had *agreed* to assume liability of all estate taxes in connection with a storage contract made by it with a private corpor-

"This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not 'on' the federal property as was Pennsylvania's." 345 U.S. 499.

In our judgment *S. R. A., Inc.* *v.* *Minnesota*, 327 U. S. 558, is not apposite for the reason that in that case the contract involved transferred the equity in the land to the purchaser, leaving in the United States only a legal title as security, rendering it the equivalent of a mortgage. The opinion pointed out that no state has power to tax property of the United States against its will; and stated that "under an implied constitutional immunity, its property and operations must be exempt from state control in tax as in other matters." *M'Culloch* *v.* *Maryland*, 4 Wheaton 316, 425; *Van Brocklin* *v.* *Tennessee*, 117 U. S. 151, 177; and *United States* *v.* *Allegheny*

UNITED STATES OF AMERICA,)
)
Intervenor)

DECIDED JUNE 16, 1956.

Before ALLEN and MARTIN, Circuit Judges, and STARR, District Judge.

MARTIN, Circuit Judge. In three separate actions consolidated on this appeal, brought by The Murray Corporation of America in which the United States of America intervened, the District Court awarded summary judgments in favor of the plaintiff in the total amount of $76,748.47 against the City of Detroit covering personal property taxes illegally collected in two installments for the year 1952 and for $14,116.30 against the County of Wayne, Michigan, for personal property tax illegally collected.

The intervention of the United States was permitted for

United States Air Force for the national defense. These sub-contracts and amendments thereto were approved by a contracting officer of the United States Air Force in accordance with the requirements of the prime contract.

Included in these letter sub-contracts, by amendment, was a partial payment clause which, as stated by the District Judge, presents the nub of the present controversy. This clause in substance provided that upon the making of any partial payment, title to all parts, materials, inventories, work in process, and non-durable tools theretofore acquired or produced by the contractor for the performance of the contract and properly chargeable to the contract under sound accounting practices should forthwith vest in the Government; and title to all like property thereafter acquired or produced by the contractor for performance of the contract and properly chargeable as aforementioned should vest in the Government federal question is presented for determination under federal and not under state law; that the partial payment clauses vesting title in the federal Government were fully authorized and effective; that under the partial payment clauses title to the property in question was vested in the United States on the assessment date, and that this is an absolute and not a bare lien or security title; that Murray is the real party in interest and so entitled to bring the actions; and that the equitable arguments advanced by the City and County have been entirely rejected by the Supreme Court of the United States.

The United States took substantially the same position and contends that the assessment was upon its property and therefore invalid under the federal Constitution.

The position of the City of Detroit was in effect that

We agree with the finding of the District Court that the partial payment clauses are not invalid for want of authority or for non-conformity with the federal statutes. We concur also in the conclusion of the trial court that "a reading of the Partial Payment Clause leaves no doubt that, upon the making of a partial payment, title to parts, materials, etc., acquired for the performance of the contract vests in the United States Government as does title to all property subsequently acquired for the performance of the contract."

Among the numerous decisions of the Supreme Court of the United States upon the question of immunity of Government property from state taxation we think *United States v. County of Allegheny*, 322 U.S. 174, is controlling authority in the instant case. In our judgment, the facts of that case are not in any livery at the site of work and upon inspection and acceptance. The Government leased the equipment to the contractor during the period for which the guns were manufactured. The machinery was bolted on concrete foundations in the contractor's plant on real estate owned by it and could be removed without damage to the building. The Supreme Court of Pennsylvania upheld the assessment by Allegheny County upon the ground that under the state law regardless of who held title to it, the machinery constituted a part of the contractor's mill for purposes of assessment and had been properly assessed as real estate. Both the contractor and the United States, which had intervened in the state litigation, appealed to the Supreme Court of the United States. That highest tribunal held that the substance of the procedure by the state assessors was to lay an ad valorem general property tax on property owned by the United States and that the Government-owned property, to the full extent of its interests therein, is to which under the contract vests in the Government as fast as constructed, became instrumentalities of the Government and for reasons of public policy cannot be seized under state laws to answer private claims. In the latter case of *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, the Supreme Court distinguished *Alabama v. King & Boozer*, 314 U. S. 1, upon the ground that under the contract involved in the *Kern-Limerick* case the United States was the real purchaser. The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department which provided that in procuring needed articles, the contractor should act as purchasing agent for the Government, title to the articles purchased should pass directly from the vendor to the Government and the Government should be directly re-had *agreed* to assume liability of all estate taxes in connection with a storage contract made by it with a private corporation. The *Allegheny County* case was thus distinguished: "*Allegheny County*, however, was quite different. The United States had leased certain machinery to the Mesta Machine Company. In imposing the state ad valorem property tax, Pennsylvania included in the Mesta assessment both the privately owned land and buildings, and the government machinery. . . . So the value of the federal property was, in part, the measure of the tax. We held the substance of this procedure was 'to lay an ad valorem general property tax on property owned by the United States', . . . and therefore invalid. Our holding was not 'dependent upon the ultimate resting place of the economic burden of the tax.'

M'Culloch *v.* *Maryland*, 4 Wheaton 316, 425; *Van Brocklin* *v.* *Tennessee*, 117 U. S. 151, 177; and *United States* *v.* *Allegheny County*, 322 U. S. 174, 176-177; were cited.

The several judgments of the District Court from which the appeals were taken in the instant controversy are affirmed.

I.

No contradiction appears in either of the briefs filed by respondents as to the large amounts and number of pending cases involved (Pet. 8).

II.

Neither is it contradicted that the Government has been confronted with the same basic problem in other jurisdictions involving even greater amounts than here with the result that uncertainty exists at the federal level as well as in local units of Government regarding the validity and effect of partial payment-title passage clauses (Pet. 9-12).

III.

Petitioners urged as their third ground that the Court of Appeals erred in invalidating a state statute, in failing to go beyond the contract provisions and examine into the agreed facts and in ignoring the careful method employed in noting on the roll that the assessment against respondent Murray covering the personal property involved was "assessed subject to prior rights of the Federal Government";* that said decision accordingly comes in conflict with the mode of assessment approved by this Court in earlier decisions, *S. R. A. v. Minnesota*, 327 U. S. 558; *New Brunswick v. United States*, 276 U. S. 547, 556 (Pet. 12); finally that conflict exists with state court decisions as to whether responsibility for payment under these circumstances rested solely on respondent Murray and not the Government (Pet. 13).

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*Ex. 3, p. 103 of Joint Appendix.

CONFLICT OF DECISIONS

Respondents concurrently open their respective responses to these reasons by stating that petitioners make no contention of conflict of decision. We submit that respondents' failure to recognize the above assertions of conflict is consistent with omission of any mention of said notation "assessed subject to prior rights of the Federal Government" in their respective factual statements.

The position of respondents that this matter does not involve decision of a state question in conflict with applicable state law results from reluctance to acknowledge any possibility that the facts of the case at hand differ from *Allegheny* and *Kern-Limerick* by virtue of:

(a) the particular facts here agreed upon,

(b) the admitted course of conduct of respondent Murray,

(c) such notation on the assessment roll, and

(d) involved here is a personal property tax which under local law may be assessed and collected from the person in possession of the property.

STATE LAWS INVALIDATED

The decision of the Court below had the effect of invalidating Michigan statutes and local ordinances as applied to transactions where a private contractor was in possession of personal property on hand on assessment day in connection with a contract calling for delivery to a prime contractor with the United States.

The Supreme Court of Michigan has sustained the right of the City of Detroit under its Charter to assess taxes on personal property against the person in possession of such personal property rather than the owner, when it so elects. In that event it has authority to collect the personal property taxes, if unpaid, by suit in assumpsit against such person in possession. This provides its complete remedy and protects whatever interest the Government has in the property.

> *Detroit Shipbuilding Co. v. City of Detroit*, 228 *Mich.* 145, 199 N. W. 645, 135 A. L. R. 597;
> *City of Detroit v. Gray*, 314 Mich. 516, 22 N. W. 2d 771.

Such determination by the State's highest Court that the person in possession of personal property is responsible for payment thereof is final and not subject to challenge in the Federal Court.

> *S. R. A. v. Minnesota*, 327 U. S. 558, 565;
> *Alabama v. King & Boozer*, 314 U. S. 1;
> *Federal Land Bank v. Bismarck*, 314 U. S. 95, 99;
> *Kern-Limerick and U. S. v. Scurlock*, 347 U. S. 110, 121.

To arrive at its decision then, the courts below must have held Michigan statutes and local ordinances, as applied to the facts before them, unlawfully interfered with the Federal Constitution. The problem is one of alleged clash between state and federal laws.

Unlawful interference is a holding of invalidity because of repugnancy. Any other view would permit a Court of Appeal to deprive this Court of appellate jurisdiction, when, in fact, holding a state statute invalid because of repugnancy to a federal law, merely by phrasing the opinion in such a way as not to use the exact words "invalid", "repugnant", "constitutional", "conflict" or "interference".

By way of example the opinion below, 234 F. 2d 380, 383, characterized the decision of this Court in *Kern-Limerick* as follows:

> "The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the U. S. under a cost-plus-fixed fee contract entered into with the Navy Department. * * *"

> "A statute may be invalid as applied to one state of facts, and yet be valid as applied to another."
>
> *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289.

GOVERNMENT'S POSITION INCONSISTENT

The position of respondents here is unlike that taken by the Government when the facts were reversed. In *Appeal No. 487, October Term,* entitled *United States and Borg-Warner Corporation v. City of Detroit,* right of review by appeal was claimed from determination of the Michigan Supreme Court holding a state statute valid where a tax was imposed on lessee of real property owned by the United States.

Arguing that the questions there were substantial, counsel for Government there urged at p. 8 of its Jurisdictional Statement:

> "This appeal presents important constitutional questions involving the immunity of the United States from taxation of its property by the States. The decision of the Supreme Court of Michigan upholding the validity of a local tax which is imposed on a lessee of property belonging to the United States which is measured by the full value of the property, carries obvious and far-reaching implications. While the precise point in issue has not been, but ought to be, settled by this Court, we believe that fundamental principles regarding the sovereign immunity of the United States, which have received repeated application in the decisions of this Court, compel the conclusion that the tax in question is constitutionally invalid."

Invalidation of the present personal property tax by the Court of Appeals likewise presents federal questions which have not been but ought to be settled by this Court and involve much farther reaching implications than the validation of the tax involved in Appeal 487.

IV.

The final reason urged by petitioners of the need for reappraisal and settlement of the doctrine of "incidence of the tax" (Pet. 13 *et seq.*) is disregarded by respondents. Similarly it was not listed as one of the issues by the Court below and was disposed of only passingly in its opinion.

Accordingly full consideration and argument are urgently needed and should be permitted to resolve this and all of the important federal issues raised by this petition.

For the reasons given, it is prayed that the petition heretofore filed be granted.

Respectfully submitted,

CITY OF DERTOIT, a Michigan municipal corporation, Petitioner,
By: PAUL T. DWYER,
Its Corporation Counsel,
BERT R. SOGGE,
VANCE G. INGALLS,
JULIUS C. PLISKOW,
G. EDWIN SLATER,
Assistants Corporation Counsel,
and
COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioner,
By: GERALD K. O'BRIEN,
Prosecuting Attorney and
HOBART TAYLOR, JR.,
PHILIP A. McHUGH,
THOMAS J. FOLEY, JR.,
Assistants Prosecuting Attorney,
and
ALBERT E. CHAMPNEY,
Of Counsel.

December 17, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 195~~6~~7

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, PETITIONERS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
CHARLES K. RICE,
Assistant Attorney General.
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INDEX

Page

Opinions below 1

Jurisdiction 2

Questions presented 2

Statement 3

Argument 6

Conclusion 10

CITATIONS

Cases:

- *Carpenter* v. *Shaw*, 280 U. S. 363 7
- *Douglas Aircraft Co.* v. *Byram*, 57 Cal. App. 2d 311 8
- *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110 ..... 7, 10
- *Mayo* v. *United States*, 319 U. S. 441 7
- *Read-York, In re*, 152 F. 2d 313 8
- *United States* v. *Allegheny County*, 322 U. S. 174 ..... 7, 10
- *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452 ..... 7, 8, 9

Statute:

- Revised Statutes, Sec. 3648 (31 U. S. C. 1952 ed., Sec. 529) 8

Miscellaneous:

- 1 Comp. Gen. 143 (1921) 8
- 20 Comp. Gen. 917 (1941) 8
- 28 Comp. Gen. 468, 470 (1949) 8
- 18 Op. A. G. 105 (1885) 8
- 20 Op. A. G. 746 (1894) 8
- 29 Op. A. G. 46 (1911) 8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 563

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, PETITIONERS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan is reported at 132 F. Supp. 899. (Joint App. 112–122.)[1] The opinion of the Court of Appeals is reported at 234 F. 2d 380. (Pet. App. B.)

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[1] A separate certified transcript of the record was not filed with the petition for writ of certiorari by the petitioners. However, the certified record was filed by the petitioners on September 10, 1956, together with a jurisdictional statement in No. 401, October Term, 1956. Accordingly, references will be made to the Joint Appendix which forms a part of that record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1956. (Pet. 9a.) On September 10, 1956, petitioners, having filed an appeal (No. 401), submitted a jurisdictional statement urging this Court to note probable jurisdiction. The United States, on October 5, 1956, filed a motion to dismiss or affirm. An order of Mr. Justice Reed was entered on September 15, 1956, extending the time for filing a petition for writ of certiorari to and including November 13, 1956. The petition for a writ of certiorari was filed on November 13, 1956. The jurisdiction of this Court to grant the petition for a writ of certiorari is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the contracting officers of the United States had authority to enter into contracts which provide for the vesting of title to parts, materials, etc., in the United States upon the making of a partial payment.

2. Whether the United States had acquired ownership of the property or whether it had acquired title as a pure security arrangement.

3. Whether a state or local *ad valorem* property tax on the property of the United States avoids constitutional invalidity where the tax is assessed to the government contractor rather than directly to the United States.

STATEMENT

The pertinent facts may be briefly summarized as follows:

On March 23, 1951, the Murray Corporation of America entered into a letter sub-contract (Joint App. 169–172) with the Kaiser-Frazer Corporation for the manufacture of certain of the parts and sub-assemblies which were required under Kaiser's prime contract (Joint App. 144–168) with the United States for the manufacture of airplane parts, tools and sub-assemblies for the use of the United States Air Force. The Murray letter sub-contract, which was in effect on January 1, 1952, provided for the vesting of title to parts, materials, etc., upon the making of partial payments in the following terms (Joint App. 174–175):

> 11. *Partial payments.*—Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions:
>
> * * * * *
>
> (b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this con-

> tract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: * * *

In addition to the sub-contract which the Murray Corporation had with Kaiser, it also had on January 1, 1952, a letter sub-contract (Joint App. 216–221), similar in nature and terms, with Wright Aeronautical Corporation (later Curtis-Wright) which latter corporation held a prime contract (Joint App. 189–215) with the United States, similar to the prime contract of Kaiser.

From August 10, 1951, to December 20, 1951, the Murray Corporation made requests on appropriate Air Force forms for partial (or progress) payments under its Kaiser sub-contract. (Joint App. 47–48.) Following audit of these requests by the Air Force and approval by the contracting officer (Joint App. 48), the Murray Corporation received thereon, prior to January 1, 1952, partial payments in the sum of $163,949.20 (Joint App. 51).

On October 30, 1951, and December 4, 1951, the Murray Corporation made requests for partial (or progress) payments under its Wright sub-contract. (Joint App. 49.) Following audit of these requests by the Air Force and approval ~~by the~~ contracting officer (Joint App. 49), the Murray Corporation received thereon, prior to January 1, 1952, partial payments in the sum of $510,827.67 (Joint App. 51).

Included in the personal property assessed to the Murray Corporation by the petitioners on January 1, 1952, were parts, materials, etc., which had been acquired or produced by the Murray Corporation for the performance of its sub-contracts. It is this property which is the subject of the disputed assessments here. On, prior and subsequent to January 1, 1952, such assessed property was clearly identified as property owned and belonging to the United States Government by tagging, labeling or by segregation from other personal property owned and belonging to the Murray Corporation in connection with the conduct of its regular business. Upon their acquisition or production by the Murray Corporation, individual tools, parts and sub-assemblies were tagged, stamped or labeled as property owned and belonging to the United States Government by serial numbers which identified them as such. Those tools, parts or sub-assemblies which were too small to permit such tagging, stamping, or labeling were segregated both in storage and in use from personal property owned and belonging to the Murray Corporation. The same procedures were followed as to materials and supplies acquired by the Murray Corporation for the performance of the sub-contracts. The aircraft operations of the Murray Corporation were entirely separated from its other operations, being conducted either in completely separate buildings, on separate floors, or in definitely divided sections of a floor. (Joint App. 56–57, 97.)

The Murray Corporation paid, under protest, the sum of $67,714.96 to the City of Detroit and the sum of $12,572.66 to the County of Wayne on account of the assessments of 1952 personal property taxes based upon the parts, materials, etc., acquired or produced for performance of the sub-contracts. (Joint App. 122–123.)

Thereafter, the Murray Corporation brought three actions in the United States District Court to recover *ad valorem* personal property taxes so assessed and paid. The United States of America was permitted to intervene upon its claim of ownership to the personal property upon which the assessments were made. (Joint App. 112.)

The District Court entered judgments in favor of the Murray Corporation (Joint App. 124–126) upon its written opinion (Joint App. 112–122). Thereafter the three actions were consolidated for appeal. (Joint App. 135–136.) On appeal the judgments of the District Court were affirmed. (Pet. 9a.)

ARGUMENT

The decision below, holding that local property taxes could not be imposed on property of the United States, represents a correct application of principles which are firmly rooted in the decisions of this Court and does not raise issues warranting further review.[2]

1. The decision of the Court of Appeals is not in conflict with that of this Court, of any other Court of Appeals or the highest court of any state, nor do petitioners so contend. Nor did the Court of Appeals decide a state question in a way to conflict with applicable State law. In the final analysis, the principal

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[2] The grounds for opposing certiorari herein are similar to those advanced by the United States in its motion to dismiss or affirm in No. 401, the appeal taken by petitioners from the same judgments below.

issue here involves the drawing of conclusions from the particular facts to determine whether the personal property assessed was that of the Murray Corporation or that of the United States. If, under the contract, the property was that of the Murray Corporation, the assessment was valid. If, on the other hand, ownership of the property, under the terms of the contract, was in the United States, it necessarily followed that the assessment was invalid. *Mayo* v. *United States*, 319 U. S. 441; *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

This Court has repeatedly held that the construction of a contract through which the United States is exercising its constitutional functions, as here, and the title which it creates present a federal question. *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452; *Carpenter* v. *Shaw*, 280 U. S. 363; *United States* v. *Allegheny County*, *supra*; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*.

Accordingly, neither the applicability of a state law nor a state question is here presented.

2. Both the District Court and the Court of Appeals decided the federal questions involved in full accord with applicable decisions of this Court.

(a) Petitioners unsuccessfully urged below, and urge here (Pet. 3), that the contracting officers of the Government had no authority under Federal law to incorporate the partial payment clauses into the procurement contracts. This Court's decision in *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, affirms the authority of contracting officers to negotiate any type of contract not specifically prohibited which will promote the best interests of government. Petitioners, asserting that the Government is specifically prohibited by statute from entering into contracts providing for partial payments, rely upon Section 3648, Revised Statutes (31 U. S. C. 1952 ed., Sec. 529). However, that provision prohibits only payments in advance of any performance of services or payments in advance of delivery of articles, title to which is not taken prior to delivery. It does not prohibit the Government from acquiring ownership on the making of partial payments.

As early as 1885, Section 3648 was interpreted by the Attorney General as permitting the making of partial payments, providing title to the property passed to the Government at the time such payments were made. 18 Op. A. G. 105 (1885). See also to the same effect: 20 Op. A. G. 746 (1894); 29 Op. A. G. 46 (1911). The same view consistently has been expressed by the Comptroller General. 1 Comp. Gen. 143 (1921); 20 Comp. Gen. 917 (1941); 28 Comp. Gen. 468, 470 (1949). Cf. *United States* v. *Ansonia Brass &c. Co.*, pp. 466–470, *supra; Douglas Aircraft Co.* v. *Byram*, 57 Cal. App. 2d 311; *In Re Read-York*, 152 F. 2d 313 (C. A. 7th).

The Court of Appeals, accordingly, correctly affirmed the trial court's holding that the partial payment clauses were not invalid for want of authority or for non-conformity with the Federal statutes. (Pet. App. B.)

(b) Petitioners unsuccessfully urged below, and urge here (Pet. 4), that the title which vested in the

United States under the partial payment clauses was merely paper or security title. This question was settled in *United States* v. *Ansonia Brass &c. Co.*, pp. 466–470, *supra.* The contract there provided that (p. 466): "The parts paid for under the system of partial payments * * * shall become thereby the sole property of the United States * * *." The contractural provision here provides that (Joint App. 175): "Upon the making of any partial payment * * * title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced * * * shall forthwith vest in the Government * * *". Both provisions express the intention of the parties to the respective contracts that the Government should acquire absolute ownership of the property prior to completion. In both contracts, particular provisions, such as payment of insurance premiums by the contractor and retention by the Government of the right to reject upon completion, were not inconsistent with the vesting of title in the United States and did not detract from the binding force of the distinct contract provisions making the United States the owner.

The Court of Appeals correctly affirmed the trial court's holding that a reading of the contract leaves no doubt that, upon the making of a partial payment, ownership of parts, materials, etc., acquired for the performance of the contract, vested in the Government. (Pet. App. B.)

(c) Once it was determined that the property in question was owned by the United States, the unbroken line of decisions of this Court required the conclusion that a local *ad valorem* tax could not be imposed on the property consistent with the constitutional immunity of the United States. Nor did the tax assume constitutional validity merely because it was assessed to the contractor rather than the United States. *United States* v. *Allegheny County,* 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

DECEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

16

No.

36

JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 783

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,

Petitioners,

v.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, and
THE UNITED STATES OF AMERICA, Intervenor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brief for Respondent in Opposition

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutes and Regulations Involved 2

Statement of the Case 3

Argument 6

I. There is No Conflict of Decision 8

II. The Decision of the Court of Appeals is Clearly Correct 8

Conclusion 14

Appendix A—Armed Services Procurement Act of 1947 .... 1b

Appendix B—Armed Services Procurement Regulations 3b

Appendix C—Charter of the City of Detroit 10b

AUTHORITIES CITED

Decisions

Page

Atkin v. Kansas, 191 U.S. 207 (1903) 10

City of Detroit v. Phillip, 313 Mich. 211 5

Craig, State Tax Collector v. Ingalls Ship Building Corp., 192 Miss. 254 (1942) 11

Douglas Aircraft Co. v. Byram County Tax Collector, 57 Cal. P. App. (2d) 311 (1943) 11

Ellis v. United States, 206 U.S. 246 (1907) 10

Esso Standard Oil Co. v. Evans, 345 U.S. 495 at 499 (1953) 5, 13

Heim v. McCall, 239 U.S. 175 (1915) 10

Kennedy v. Silas Mason Co., 334 U.S. 249, 256 (1948) 12

Kern-Limerick, Inc. and United States v. Scurlock, Commr. Rev. of Arkansas, 347 U.S. 110, 116, 117, 121, 123 and footnote 14 (1954) 5, 7, 9, 10, 13, 14

Muschany v. United States, 324 U.S. 49, 63 (1945) . . 10

Neilson v. Lagow, 12 How. 98 (1851) 10

Pingree v. Auditor General, 120 Mich. 95, 162, 109 . . 5

Read York, In re., 152 F (2d) 313, 316 (1945) 11

Superior Shipbuilding Co. v. Beckley, 175 Wis. 337 (1921) 11

Taylor v. County of Genesee, 286 Mich. 674, 677-78 (1938) 5

United States v. Allegheny County, 322 U.S. 174, 182, 187-88 (1944) 5, 7, 11, 12, 13

United States v. Ansonia Brass & Copper Co., 218 U.S. 452, 466-72 (1910) 11, 12

Page

United States v. Hodson, 10 Wall 395 (1870) 10

United States v. Linn, 15 Pet. 290, 315-16 (1841) ... 10

United States v. Tingey, 5 Pet. 115, 127 (1831) 10

Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886) 5, 10

Wright Aeronautical Corp. v. Glander, 151 Ohio 29, (1949) 11

STATUTES

Armed Services Procurement Act of 1947—
(41 U.S.C.A. Sec. 151 (c))

62 Stat. 23(a) 2, 9, 10

Michigan General Property Tax Law—6 Mich. Stat. Anno. Sec. 7-1—7.243 .... 4, 5

City of Detroit Charter 4

REGULATIONS

10 Code of Federal Regulations, 1947 Supp. Chap. VIII, Par. 805, 407-2 (12 Fed. Register 7693) (A.S.P.R. 5-407-2 (1)) 9

OPINIONS, ADMINISTRATIVE RULINGS AND OTHER REFERENCES

20 Opinions of Attorney General (U.S.) 746, 747 (1894) 11

29 Opinions of Attorney General (U.S.) 46, 48.... 11

Page

4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949)—Comptroller General Dec. No. B-83260........ 11

4 Contract Cases Fed. (C.C.H.) Sec. 60,016—Opinion of Judge Advocate General, SPJGC (1945) 101118 11

Opinions of Attorney General—Michigan
January 17, 1936........................ 5
May 28, 1941........................... 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 563

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Petitioners,
v.
THE MURRAY CORPORATION OF AMERICA
a Delaware Corporation, and
THE UNITED STATES OF AMERICA, Intervenor,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 132 F. Supp. 899. The opinion of the Circuit Court of Appeals for the Sixth Circuit (Appendix B to Petition for Certiorari) is reported at 234 F. (2d) 380.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Certiorari.

QUESTIONS PRESENTED

The questions presented by the instant case can be succintly stated as follows:

1. Did the United States contracting procurement officers have authority under Federal law to provide for and approve the inclusion of partial payment-title vesting clauses,[1] in subcontracts for the production of defense material, providing that upon receipt of a partial payment upon the purchase price title to all materials, inventories and work in process produced or acquired for the United States should vest in the United States?

2. Was the title which vested in the United States, pursuant to the partial payment-title vesting clauses in defense material procurement contracts, absolate title or merely security title or a lien?

3. Is property owned by the United States subject to state and local **ad valorem** personal property taxation merely because the property is in possession of a private contractor and the tax is assessed to the contractor and not directly to the United States?

STATUTES AND REGULATIONS INVOLVED

Pertinent sections of the Armed Services Procurement Act of 1947 (C. 65, 62 Stat. 21, et seq., 41 U.S.C.A. 151, et seq.) under which the defense contracts here involved were negotiated and entered into are set forth in Appendix A attached hereto. The Armed Services Procurement Regulations dealing with partial payments and the fundamental distinction between partial and advance payments are set forth in Appendix B hereto.

Exerpts from the City of Detroit Charter, providing for a tax upon personal property, which are relevant to the issues here involved appear in Appendix C hereto.

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[1] The text of said partial payment-title vesting clauses appears herein at page 3 and in Appendix B (page 3b) attached hereto.

STATEMENT OF THE CASE

This is a consolidated action originally brought by plaintiff-respondent, The Murray Corporation of America (hereinafter referred to as "Murray"), for a refund of personal property **ad valorem** taxes assessed by defendants-petitioners, City of Detroit and County of Wayne as of January 1, 1952 upon personal property of the United States then in the possession of Murray under two letter subcontracts, under letter prime contracts between Kaiser Manufacturing Company and the United States and Curtiss-Wright Corporation and the United States, respectively, for the manufacture of parts and components for aircraft and aircraft engines for the United States Air Force for defense purposes.

Title to such personal property was vested in the United States on and prior to the assessment date by virtue of provisions of partial payment-title vesting clauses, incorporated in the letter subcontracts, which provided expressly that upon receipt by Murray of

> "partial payments . . . prior to delivery, on work in progress for the Government under this contract . . .
>
> (b) Upon the making of any partial payment under this contract, **title** to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, **shall forthwith vest in** the Government; and **title** to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid **shall vest in the Government forthwith** upon said acquisition or production . . ."[2].

---

[2] This is a standard and widely used partial payment clause contained in procurement contracts for defense work for the United States Government, which clause is permitted by Federal law and is provided for under applicable procurement regulations.

Partial payments were made to Murray under each of the aforementioned letter subcontracts prior to January 1, 1952, the assessment date, and thereupon title vested in the United States and remained vested in the United States on and after such date. Throughout, Murray contended that the property was owned by the United States and was immune from local ad valorem taxation and that the assessment and taxation of such property to Murray was illegal and void. After exhausting all administrative review Murray paid the taxes in question involuntarily and under written protest.

The cause was submitted to the District Court upon plaintiff-respondent's Motion for Summary Judgment and at the hearing of March 11, 1954—

> "it was **agreed** among the parties that **there was no genuine issue of any material fact,** and that a summary **judgment in favor of the plaintiff, or in favor of the defendants would be in order."**

See opinion of District Court, 132 Fed. Supp. 899, 900.

The tax here in question is an **ad valorem property tax** assessed pursuant to the Michigan General Property Tax Law and the Charter of the City of Detroit.

The City of Detroit personal property taxes here involved were assessed pursuant to Title VI, Chapter II, Section 1 of the Charter of the City of Detroit which provides:

> "Section 1 **All** real and **personal property** within the city **subject to taxation by the laws of this state shall be assessed** at its true cash value by the board of assessors herein provided . . . **All taxes upon personal property** may be assessed in any district, whether the person assessed is a resident of such district or not."

Both the City of Detroit and County of Wayne personal property tax assessments are made subject to the authority of the General Property Tax Act of Michigan, Act 206 of the

Public Acts of Mich. 1893, as amended (6 Mich. Stat. Anno. Sec. 7.1-7.243).

The tax is levied and assessed upon **property,** though collection may be enforced against the owner or, under certain circumstances, the person in possession. The tax is not a specific or privilege tax assessed against the taxpayer. *City of Detroit v. Phillip,* 313 Mich. 211; *Pingree v. Auditor General,* 120 Mich. 95, 102, 109.

If the title to and ownership of the property assessed was vested in the United States, the assessment is clearly void because such property owned by the United States is immune from taxation, even though in the possession of Murray. *United States v. Allegheny County,* 322 U.S. 174 (1944), *Van Brocklin v. Tennessee,* 117 U.S. 151 (1886); see *Kern-Limerick, Inc. and United States v. Arkansas.* 347 U.S. 110, 123, and footnote 14; compare *Esso Standard Oil Co. v. Evans,* 345 U.S. 495 at 499 (1953). This is also recognized by Michigan authorities. *Taylor v. County of Genesee,* 286 Mich. 674, 677-78 (1938); *Opinions of Michigan Attorney General,* January 17, 1936 and May 28, 1941.

On the other hand, if the partial payments clause was invalid under Federal law or if the title under the partial payments clause was only a bare lien or security title—as petitioners contend—and ownership in fact remained in Murray on the tax assessment date, then under both Michigan and Federal law the property was not immune from taxation and the assessment was valid. That is the basic issue presented by this case.

The District Court and the Court of Appeals concluded as a matter of law that the partial payments clauses were authorized and valid under Federal law and that absolute title and ownership to the property in question was vested in the United States on tax assessment day.

ARGUMENT

The issues presented by this case were thoroughly considered and correctly decided by the Court of Appeals in accordance with the decisions of this Court and do not warrant review on certiorari.

At the outset it should be observed that the contention of petitioners (pages 3 and 4 of Petition for Certiorari) that the validity of state and local taxing statutes is here involved is wholly without merit or foundation.

Neither the Court of Appeals nor the District Court decided that the Michigan General Property Tax Law or the Charter of the City of Detroit, pursuant to which the taxes in question were assessed, were invalid as repugnant to the Constitution, treaties or laws of the United States. The courts below held that under the partial payments clause in question the United States was vested with absolute title to the property in question and accordingly Murray had no interest in the property which could be subject to taxation. The validity of the ad valorem tax laws of the State of Michigan and of the City of Detroit have never been questioned in this litigation. The only real question has been whether title was vested in the United States or in Murray.

Petitioners have never contended that property of the United States may be subjected to state ad valorem property taxes and the Michigan statute has never been construed as permitting the taxation of Federally owned property. Indeed, in his argument before the District Court counsel for the City of Detroit stated:

> "And I might say that it is not the position of the City that it has the right to tax the property of the United States Government. But we contend that we did not do that in this case."[3]

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[3] Transcript of proceedings before Honorable Thomas P. Thornton, District Judge, March 11, 1954; page 76.

In their joint Reply Brief in the Court of Appeals petitioners further stated that—

> "Neither the County nor the City has contended that these levies were specific taxes or that they were not **ad valorem** property taxes."

The District Court noted that—

> "There is no disagreement on the proposition that local government may not tax property owned by the Federal Government. Whether the personal property here assessed was owned by the Federal Government in the sense that it could not be taxed at a local level is the issue." 132 F. Supp. 899,904.

Petitioners' statement (pages 3 and 4 of Petition for Certiorari) that by determining that title to the personal property in question was vested in the Government the Court of Appeals caused "invalidation of state and local taxing statutes . . . as repugnant to the implied constitutional immunity of the United States," is a non sequitur. Admittedly the state and local taxing statutes imposing an ad valorem tax on property are valid. If title to the property was vested in the United State on tax assessment day, the property was constitutionally immune from such taxation. If title was not vested in the United States, there was no immunity.

The Court of Appeals merely applied Federal law to determine whether title to property produced for the sole ownership and use of the United States, in connection with the national defense, was in fact vested in the United States. *United States v. Allegheny County* 322 U.S. 174, 182; (1944) *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). Having so determined, the doctrine of Federal constitutional immunity undisputably obtains.

I.

THERE IS NO CONFLICT OF DECISION

The Petition for Certiorari makes no assertion of conflict of decision. The decision below is in complete accord with the holdings of this Court, and other Federal and state courts, concerning the validity and efficacy of partial payment clauses in Government procurement contracts and the constitutional immunity of Government-owned property from state and local ad valorem taxes.

II.

THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT

The opinion of the Court of Appeals discloses the searching examination made by that Court of the controlling decisions of this Court and the correct application of the law of those decisions to the instant case. No amount of strained semantics or expressed dissatisfaction with prior decisions of this Court can convert the issues here involved so as to warrant review by certiorari.

The Partial Payment Clauses Vesting Title in the Federal Government Included in the Murray Subcontracts were Authorized, Effective and Valid.

Petitioners' contention that the Air Force procurement officers lacked authority to provide for the inclusion of partial payment clauses in the subcontracts here involved, transferring title to aircraft parts and components—manufactured by Murray for the United States—to the United States upon Murray's receipt of a partial payment upon the purchase price is contrary to express statutory provision and the decisions of the Court.

The subcontracts here involved and the prime contracts under which they were entered into were negotiated pursuant to authority contained in the Armed Services Procurement Act of 1947, 62 Stat. 23(a), (41 U.S.C. Section 151(c)) and regulations promulgated pursuant thereto. Congress expressly provided in Section 4(a) of this act that—

> "Except as provided in subsection (b)[4] of this section, contracts negotiated pursuant to Section 151(c) of this title may be of **any type** which in the opinion of the agency head will promote the best interests of the Government . . ."

Following the enactment of the Armed Forces Procurement Act of 1947, the Secretaries of the respective departments of defense (Army, Navy & Air Force) promulgated and issued joint regulations commonly referred to as the "Armed Services Procurement Regulations"[5], which regulations contained and authorized the specific partial payments clauses incorporated in the subcontracts here in question.

This very section of the Armed Service Procurement Act of 1947—Section 4a—was recently considered by this Court in *Kern-Limerick, Inc. and United States v. Scurlock, Commr. Rev. of Arkansas,* 347 U.S. 110, 116 (1954) wherein it was held that Congress has granted wide discretion to the defense procurement agencies in determining the type of contract which would promote the best interests of the Government.

It has long been recognized that as an incident of the general right of sovereignty the United States may, within its Constitutional powers, through its various departments, enter into contracts which are not prohibited by law and are appropriate to the exercise of such powers (*Kern-Limerick and United States v. Scurlock, Commr. Rev. of Arkansas,* 347 U.S. 110, 116 (1954); *Muschany v. United States,* 324 U.S. 49,63 (1945); *Van Brocklin v. Tennessee,* 117 U.S. 151, 154 (1886); *United States v. Linn,* 15 Pet. 290, 315-316 (1841); *United States v. Tingey,* 5 Pet. 115, 127 (1831); *United States v. Hodson,* 10 Wall. 395 (1870); *Neilson v. Lagow,* 12 How. 98 (1851)) and like a private individual may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Heim v. McCall,* 239 U.S. 175 (1915); *Ellis v. United States,* 206 U.S. 246 (1907); *Atkin v. Kansas,* 191 U.S. 207 (1903).

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[4] Subsection (b) excludes cost plus a percentage-of-costs-type contracts which are not here involved.

[5] Armed Services Procurement Regulations (A.S.P.R.) 5-407-2(1), (1947 Supplement Code of Federal Regulations Title 10, Chapter VIII, Paragraph 805.407-2, Effective November 1, 1947, Printed in 12 F. R. 7693), Appendix B hereto.

Thus in the absence of prohibition procurement officers clearly have authority to include partial payment-title vesting clauses in defense contracts. The inclusion of such provision is manifestly within and appropriate to the just exercise of powers granted to procurement officers by the Armed Services Procurement Act of 1947.[6]

The fundamental error in petitioners' contention lies in their failure to recognize the clear distinction between "advance payments" and "partial payments" despite the fact that the Armed Services Procurement Regulations specifically distinguish between such payments.[7] Partial payments upon the purchase price do not fall within statutory prohibitions relative to advance payments which are in the nature of a loan. The practice of using partial payment clauses in procurement contracts has been followed since the early 1800's to the present day. The validity of such partial payment clauses with title vesting in the Government has been recognized and affirmatively approved by the courts, the Attorney General, the Comptroller General and the Armed Services. *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); In re *Read York*, 152 F (2d) 313,316 (1945); 20 *Opinions of Atty. Gen.* (U.S.) 746, 747 (1894); 29 *Opinions of Atty. Gen.* 46, 48; *Comptroller Gen. Decision* No. B-83260, 4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949); *Opinion of Judge Advocate Gen.*, SPJGC, (1945) 101118, 4 Contract Cases Fed. (C.C.H.) Sec. 60,916.

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[6] It is manifest that such provisions contained in 80% of Air Force procurement contracts were included to assure the Federal government of complete and absolute control and ownership of essential, basic and critical war material at all times—even during the process of manufacture and it was so stipulated by the parties (Stipulation No. 2, paragraph (1), Joint Appendix (85-86)). The clause was not for the mere purpose of avoiding state ad valorem taxes, as now intimated by petitioners (Petition for Certiorari, page 5). However, even if this were the purpose of such clause, the power of Federal procurement officers to include such provision in the contract would not thereby be limited or barred. *Kern Limerick v. Scurlock* 347 U. S. 110,116-7.

Absolute Title to the Property in Question was Vested in the United States.

It has long been recognized that where Federal procurement contracts so provide, title to material on hand and goods in process, in the possession of a contractor, vests in the United States upon receipt by the contractor of a partial payment upon the purchase price. Such title in the United States is absolute and complete—not bare legal title for security purposes—and the property thus acquired is immune from state and local ad valorem taxes, *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); *In re Read York*, 152 F (2d) 313,316 (1945); *Douglas Aircraft Co. v. Byran County*, 57 Cal. App. (2d) 311 (1943); *Craig, State Tax Collector v. Ingalls Ship Building Corp.*, 192 Miss. 254 (1942); *Superior Shipbuilding Co. v. Beekley*, 175 Wis. 337 (1921); *Wright Aeronautical Corp. v. Glander*, 151 Ohio 29 (1949).

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[7] See Appendix B hereto, page 9b.

Petitioners' contention that Murray followed a course of conduct, in dealing with the assessed property, inconsistent with the claim that absolute title vested in the United States is without foundation. Virtually every argument advanced by petitioners in an attempt to support such contention was rejected by this Court in *United States v. Allegheny County*, 322 U.S. 174 (1944) and *United States v. Ansonia Brass and Copper Co.*, 218 U.S. 452 (1910).

The District Court and the Court of Appeals thoroughly considered all of the undisputed facts and the inferences to be drawn therefrom and rejected petitioners' contention as being contrary to law and the express provisions of the subcontracts in question. Accordingly, petitioners' contention (Petition for Certiorari, pages 5-6, and 13) that Murray engaged in a cause of conduct inconsistent with the vesting of absolute title in the United States does not present a substantial question for review by this Court. *Kennedy v. Silas Mason Co.*, 334 U.S. 249,256 (1948).

Property Owned by the United States is not Subject to State and Local Ad Valorem Property Taxes by Virtue of the Fact that it is in Possession of a Private Contractor.

Petitioners' argument that the "incidence" of the tax is upon Murray because they assessed the property and sent the tax bill to Murray is without validity. The "incidence" of the ad valorem personal property tax here involved is upon the property and not upon the person to whom the tax bill is sent. (See Court of Appeals opinion, 234 F (2d) 380 at 383; and *City of Detroit v. Gray*, 314 Mich. 516, 521, and *Pingree v. Auditor General*, 120 Mich. 95, 102, 169). This Court, in unequivocal language, held in *United States v. Allegheny County*, 322 U.S. 174, 187-188 (1944) that Government owned property is immune from state and local ad valorem taxes either as against the Government or the person in possession of such property.[8] This principle was further reaffirmed in *Esso Standard Oil Co. v. Evans*, 345 U.S. 495,499 (1953), and recognized in *Kern-Limerick Inc. v. Scurlock, Commr. Rev. of Arkansas* 347 U.S. 110, 123. Petitioners' mere dissatisfaction with and refusal to accept the decision of this Court in *Allegheny* is not sufficient to warrant review by certiorari.

A reading of the opinion of the Court of Appeals will clearly negative the assertion that important issues were left unanswered by that Court.

The mere fact that the application of the doctrine of Federal Constitutional immunity of Federally owned property is national in its scope and importance because of the long and extensive use of partial payment-title vesting clauses in defense procurement contracts of the United States does not of itself furnish the basis for further review of principles long established by this Court and repeatedly and most recently reaffirmed.

Furthermore, the argument of petitioners that the doctrine creates hardships and inequities hardly affords a basis for such review. "The equities in this important conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization" and as this Court suggested in *Allegheny* at pages 190-191, if any remedy is warranted, the "remedy lies in

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[8] It is worthy of note that the Petition for Certiorari (page 7 thereof) carefully points out that this case does not involve a privilege or specific tax but an ad valorem property tax. Having made this pointed distinction petitioners then seek to ignore it and ask the Court to treat this case as if the tax here involved were a privilege or specific tax and overrule its decisions holding that property of the United States is constitutionally immune from state and local ad valorem property taxation.

petition to the Federal Congress, which also is their Congress." See *Kern-Limerick v. Scurlock*, 347 U.S. 110, at 116-7.

CONCLUSION

The decision below is clearly correct, the questions involved do not call for further review by this Court and no substantial question is presented. It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VICTOR W. KLEIN
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Attorneys for Respondent,
THE MURRAY CORPORATION OF AMERICA

December 5, 1956

APPENDIX "A"

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.

Section 151. Purchases and contracts for supplies and services —(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

. . . .

Advertising requirements; exception of certain purchases and contracts from requirements.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

. . . .

(10) for supplies or services for which it is impracticable to secure competition;

. . . .

Appendix "A"

Section 153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151 (c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(c) All contracts negotiated without advertising pursuant to an authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Feb. 19, 1948, c. 65, Sec. 4, 62 Stat. 23; Oct. 31, 1951, c. 652, 65 Stat. 700.

APPENDIX "B"

Armed Services Procurement Regulations (A.S.P.R.) 5-407.2(1), (1947 Supplement Code of Federal Regulations Title 10, Chapter VIII, Paragraph 805,407-2, Effective November 1, 1947, Printed in 12 F. R. 7693).

Sec. 805.407-2 *Partial Payments*—(a) *When payments are not to exceed 75 per cent of the cost of the property.* In those cases where it is contemplated that partial payments in an amount not to exceed 75 per cent of the cost to the contractor of the property will be made, the contract will contain the following article:

Partial Payments: Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: *Provided*, That such partial payments shall not exceed 75 per cent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: *Provided further*, That in no event shall the total of unliquidated partial payments (see (*c*) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 per cent of the total contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided*, That nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder: or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payments for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and the applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct, and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

(b) *When payments are not to exceed 90 per cent of direct labor and material costs.* In those cases where it is contemplated that partial payments in an amount not to exceed 90 per cent of the direct labor and material costs to the contractor will be made, the contract will contain the following article:

Partial payments. Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions:

(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: *Provided*, That such partial payments shall not exceed 90 per cent of the direct labor and direct material costs to the Contractor of the property upon which payment is made, which costs shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; *Provided further*, That in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 per cent of the contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided*, That nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of the termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction or of damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payments shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

Armed Services Procurement Regulation

Excerpt re advance vs. partial payment

"**Nature of advance payments.** Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. **Advance payments are to be distinguished from 'partial payments' and 'progress payments' and other payments made because of performance or part performance of a contract.**"

32 Code of Fed. Reg., 1949 ed., 1950 Pocket Supp., Chap. IV., Sub-part E, Sec. 402-501.

APPENDIX "C"

CHARTER OF THE CITY OF DETROIT

TITLE VI

CHAPTER II

Assessments-General

. . . .

Assessments; Districts; Rolls:

Section 1. All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. Assessments shall be made according to assessment districts, the boundary lines of which shall conform to ward boundaries as established from time to time by the common council. There shall be an assessment roll in book form for each such district. All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not.

. . . .

CHAPTER IV

TAXES

Date Payable; Liability for Payment:

Section 1. All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed. The owners or occupants or parties in interest to any real estate assessed hereunder shall be liable to pay such taxes, and all assessments levied in accordance herewith. The owners or persons in possession of any personal property shall pay all taxes assessed thereon.

. . . .

Collection of Taxes on Personal Property:

Sec. 26. On and after the twenty-sixth day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other than real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining thereafter shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid, and no transfer of the personal property assessed shall operate to divest or destroy such lien. (As amended April 5, 1937. In effect April 14, 1937.)

* * * * * *

Taxes a Debt:

Sec. 27. All city taxes upon personal property and real estate and special assessments thereon in addition to being a lien upon the property assessed shall become a debt against the owner from the time of the listing of the property for assessment, and shall remain a debt against the owner of the property or his estate after his death, until the same are paid.

* * * * * *

17

Nos.
18
36

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

Nos. 18 and 36

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Appellee, and
THE UNITED STATES OF AMERICA, Appellee.

*ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT*

Petition for Rehearing
of
Appellee

Victor W. K[illegible]
W[illegible] M. S[illegible]

Attorneys for Appellee,
The Murray Corporation of America.

INDEX

Page

1. The point upon which the majority based its opinion—

> that the Michigan and Detroit ad valorem property taxes were in effect specific taxes "for the privilege of using or possessing" Government-owned property and that the differences between such types of taxes were not basic or fundamental, but mere "empty formalisms"—

was never urged by Appellants, the issue was not before the Court, and Appellee was not afforded a fair opportunity to be heard thereupon. The question was injected into this case for the first time by the majority of the Court in its opinion.............................. 2

In the District Court...................... 3

In the Court of Appeals.................. 4

Before the United States Supreme Court.... 5

Jurisdictional Statement of Detroit and Wayne County 5

Appellants' Petition for Writ of Certiorari 6

Oral Argument before this Court......... 7

Borg-Warner Case
Continental Case 8

2. (a) The distinction in Michigan between an ad valorem property tax and a specific (privilege) tax for "using or possessing" property is basic and fundamental under the Michigan Constitution and Michigan decisions thereunder and is not an "empty formalism";

Page

(b) To hold otherwise, as is done by the majority opinion, is to do violence to and to obliterate the express provisions and mandate of the Michigan Constitution and long line of Michigan decisions in effect for over 100 years and to overrule a long line of decisions of the United States Supreme Court 10

3. By admittedly adding language to the General Michigan and Detroit ad valorem property tax laws, the majority of the Court have taken upon themselves the complete revision of the Michigan Constitution (with respect to taxation) and the property tax laws 16

4. The privilege tax imposed under Act 189 in the Borg-Warner case is basically different from the ad valorem property taxes in the Murray case and counsel for the City of Detroit and City of Muskegon expressly so urged in their briefs and at the oral argument 17

5. The assessing offices of Detroit and Wayne County, in practice, in this very case did not attempt to assess Murray for the "privilege of using or possessing" Government-owned property under the general property tax laws here in question 2

Conclusion 2

AUTHORITIES CITED

Page

American Baptist Missionary Union v. Peck, 10 Mich. 341 13

Arnold v. Ogle Construction Company, 333 Mich. 652 13

Banner Laundry v. State Tax Board.............. 14

Borg-Warner v. Detroit, 345 Mich. 601.............. 18

Boyer-Campbell Co. v. Fry, 271 Mich. 282.......... 21

Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 21

Detroit Shipbuilding Co. v. City of Detroit, 228 Mich. 145, 148 19

Esso Standard Oil Co. v. Evans, 345 U.S. 495...... 16

Flint v. Stone Tracy Co., 220 U.S. 107............. 15

Henneford v. Mason, 300 U.S. 577................ 16

Pacific Co. v. Johnson, 285 U.S. 480............... 15

Pingree v. Auditor General, 120 Mich. 95, 108 (1899) 8, 10, 11, 12

Plummer v. Coler, 178 U.S. 115.................. 15

Ryerson v. Utley, 16 Mich. 269.................. 13

Smith Co., C. F. v. Fitzgerald, 270 Mich. 659, 673 (1935)..........................8, 10, 12

Tradesmens National Bank of Oklahoma v. Oklahoma Tax Commissioner, 309 U. S. 560........ 15

U.S. v. Allegheny County, 322 U.S. 174.............6, 16, 19

Page

Vernor v. Secretary of State, 179 Mich. 157........ 13

Michigan Constitution and Statute

Michigan Constitution of 1908

Article X, Section 3 (1 M.S.A. 409)...... 4, 8, 10, 11

Article X, Section 4 (1 M.S.A. 414)...... 11

Article V, Section 21 (1 M.S.A. 303)..... 13, 16, 17

Article X, Section 21 (1 M.S.A. 426; 1957 Supp. 173).................... 12–13

Article X, Section 1 (1 M.S.A. 407)...... 12–13

Article X, Section 6 (1 M.S.A. 416)...... 17

Michigan Constitution of 1850

Article XIV, Section 11 (1 M.S.A. 184).... 11

Article XIV, Sections 1 & 10 (1 M.S.A. 183-4).................. 11

Michigan General Property Tax (6 M.S.A. 7.1).... 12–13, 14

Michigan General Property Tax (6 M.S.A. 7.14)... 19

Texts

Cooley on Taxation, Vol. 1, 4th Ed. p. 143.....8, 10, 12

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vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Appellee, and
THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Rehearing of Appellee

To the Honorable Justices of the
United States Supreme Court:

The Murray Corporation of America, the Appellee abovenamed, presents its Petition for Rehearing of the above-entitled cause, and in support thereof, respectfully shows:

1.

The point upon which the majority based its opinion—

> **that the Michigan and Detroit ad valorem property taxes were in effect specific taxes "for the privilege of using or possessing" Government-owned property and that the differences between such types of taxes were not basic or fundamental, but mere "empty formalisms"—**

was never urged by Appellants, the issue was not before the Court, and Appellee was not afforded a fair opportunity to be heard thereupon. The question was injected into this case for the first time by the majority of the Court in its opinion.

The **Appellants** (City of Detroit and County of Wayne) **at no time** in this case (before the District Court, Court of Appeals or Supreme Court) **contended that the ad valorem taxes here in question were in effect specific taxes "for the privilege of using or possessing" property, title to which was vested in the United States.**

The conclusion of the majority of the Court that the Michigan and Detroit "General Property Tax" in effect was a privilege or specific tax for "the privilege of using or possessing personal property" was introduced into this case for the first time by the majority opinion.

Appellants expressly admitted throughout that:

> **"Neither the County nor the City has contended that these levies were specific taxes or that they were not ad valorem property taxes."**

Reply Brief, Court of Appeals, page 13.

This was not an issue before this Court. Appellee therefore never had a fair opportunity or occasion before this to address itself to the substantive fallacy of the foregoing conclusion (of the majority) under the Michigan Constitution and long line of Michigan and United States decisions to the contrary.

In the District Court

City of Detroit Brief

At the outset the City of Detroit (Pages 1 and 2) stated:

> "This case . . . deals with the right of local subdivisions of state government to impose nondiscriminatory **ad valorem taxes on personal property acquired,** and being processed by an independent contractor . . . for eventual delivery to the United States Air Force."

At Page 43 the City of Detroit frankly stated:

> "It is defendant's position that **the assessment** in the present case was **against the property** in question **under Michigan** law.

And again at Pages 55 and 56, arguing that title to the property was only a security title in the Government, the City of Detroit contended that:

> "It would escape altogether the payment of this nondiscriminatory property tax which is required to be **assessed against all property,** real and **personal, within the jurisdiction** of the state by **constitutional** and **statutory** provisions existing in **Michigan."**

The **County Brief** adopted the City argument on these points.

This is a far cry from any contention or conclusion that the ad valorem property taxes were not assessed against the property but were in substance and effect specific or privilege taxes for the use of the property. The District Judge in his opinion clearly understood the argument and contention of Defendants (City of Detroit and County of Wayne) to be as set forth hereinabove (R. 117 and 118).

In the Court of Appeals

City of Detroit Brief

At page 2, the City of Detroit stated:

> "Appellee in this case asked the Court to grant it immunity from a nondiscriminatory **ad valorem tax on appellee's property interest in the personal property** in its possession which it acquired and fabricated for profit as an independent sub-contractor."

At Page 40, the City of Detroit stated:

> "The taxes are nondiscriminatory, that is, 'uniform', as required by the Constitution of Michigan, Article X, Section 3."

This section of the Michigan Constitution requires that only ad valorem property taxes upon the property be uniform. This constitutional provision as to uniformity does not relate to specific or privilege taxes.

County Brief

At Page 35, the County stated:

> " . . . we contend . . . that no absolute title to property vested in the United States and that the **property in question** was therefore still **subject** to an **ad valorem property tax."**

And again at Page 47:

> " . . . never intended an absolute title to pass to the United States government in the personal **property subject** to the ad valorem **tax."**

This is directly contrary to the conclusion that the tax here involved is not a tax upon the property, but is one for the privilege of using or possessing the property.

Joint Reply Brief of Appellants (Page 13)

> **"Neither** the County nor the City has **contended** that **these levies were specific taxes or that they were not ad valorem property taxes.**

Court of Appeals Opinion

The Court of Appeals in its opinion clearly understood that the Appellants City and County were not contending that these taxes were specific or privilege taxes, for "using or possessing" but that they were contending that "the inclusion of the partial payment-title vesting clause would not defeat an **ad valorem tax on personal property** . . . " (R. 273)

Before the United States Supreme Court

Jurisdictional Statement of Detroit and Wayne County

At page 5 under **"Questions Presented"** Appellants stated that the question before this Court was—

> Whether the partial payment-title vesting clause caused invalidation of "state and local taxing statutes and non-discriminatory **ad valorem personal property taxes** . . . **upon** such **materials** . . . "

At page 6, under the heading of **"Statement of the Case"** Appellants state to this Court:

> "The matter here presented involves an appeal of three consolidated causes brought by plaintiff-appellee to recover **personal property ad valorem taxes** levied by defendants-appellants based on a common assessment as of January 1, 1952 **upon personal property** in appellee's possession . . . "
>
> "The mere finding that this is **an ad valorem property tax on personal property** of the government in the hands of a private party is not just cause for nullifying it, . . ."

Appellants' Petition for Writ of Certiorari

Appellants stated (at page 5)—

> "These contentions stem from the imposition of an assessment for the purpose of collecting a nondiscriminatory **ad valorem tax on personal property** acquired and being processed by an independent contractor . . . "

Appellants stated the questions presented for review were—

> "Whether inclusion of partial payment and transfer of title clauses would operate to defeat **an ad valorem tax on personal property** in the hands of an independent sub-contractor."
>
> "Whether the **subject assessed property** is entitled to exemption from a non-discriminatory **ad valorem local property tax,** even if title is held to have passed to the Government by virtue of the questioned contract provisions?"

The **questions** posed by Appellants for review in the Jurisdictional Statement and in the Petition for Writ of Certiorari **did not indicate that Appellants were contending that the ad valorem property taxes upon personal property were in substance and effect specific or privilege taxes for the use or possession thereof.**

In their Joint Briefs before this Court, Appellants did not contend that the ad valorem property taxes were privilege or specific taxes for the use or possession of the personal property. To the contrary, they argued that because personal liability attached (for purposes of collection), such as obtained in *Allegheny*, and because the assessing officers, (without authority under Michigan law) stated that the assessment was subordinate to rights of the Federal Government, the incidence of the ad valorem property tax was therefore on the contractor. (Under the statute he would have a lien on the Government-owned property and be entitled to collect the same from the owner.) This same argument was made by the County in *Allegheny* and was flatly rejected by this Court.

With the issues framed as they were before this Court, in

Appellants' Jurisdictional Statement, Petition for Certiorari and Brief, Appellee could hardly be expected to meet a contention that the taxes in substance or effect were privilege or specific taxes for use or possession.

The majority opinion frankly admits that the tax statute does not state that it is "for the privilege of using or possessing personal property," and such language is added by implication and by judicial legislation long proscribed by this Court. As will be pointed out hereafter, the Michigan Constitution recognizes a basic and fundamental difference between ad valorem property taxes and specific or privilege taxes.

At the Oral Argument before this Court

In the *Murray* case, Counsel for the City, on November 13, 1957 in response to pointed questions from the Court, including some of those who joined in the majority opinion, virtually conceded that the taxes were ad valorem property taxes. Mr. Taylor, in closing, on November 14, 1957 directing his rebuttal to the title question, **frankly stated in no uncertain terms that the taxes in question were plain, ordinary ad valorem property taxes.**[1]

At no time at the oral argument did counsel for the City or the County contend that these taxes were in effect privilege or specific taxes for the privilege of using or possessing the property.

---

[1] The transcript of Mr. Taylor's concluding arguments, and other arguments of counsel, we understand, is available to the Court, but not to counsel.

It might now be claimed that Appellants suggested this question in their reply brief (p. 31) served upon Appellee two or three days before the Argument. This **question was never raised before** and was not urged by Appellants at the Oral Argument. Appellee was never afforded an opportunity to file a reply brief—though no reply was indicated by virtue of Appellants' admissions that the tax was an ordinary ad valorem property tax. For Appellants to attempt to inject an issue into the case for the first time in a reply brief hardly is a prescribed, accepted or fair way in which to raise an issue before this Court. See, Jurisdictional statement of questions, supra, p. 5.

Borg-Warner Case
Continental Case

The City of Detroit (Appellants here) in its brief before this Court in the *Borg-Warner* case, No. 26, at Page 8, et seq., argued—as we here argue—

> "Under the **Constitution of Michigan** there are **two** general **methods** of taxation—**ad valorem** and **specific.** *Pingree v. Auditor General*, 120 Mich. 95, 108 (1899); *C. F. Smith Co. v. Fitzgerald*, 270 Mich. 659, 673 (1935).
>
> "One of the definitions of ad valorem taxes, given in the *Pingree case* (p. 99), *supra*, which is similar to that given in *Cooley on Taxation*, Vol. 1 (4th Ed.) p. 143, is:
>
> > " 'Ad valorem—according to value—* * * An ad valorem tax is a tax or duty upon the value of the article or **thing subject to taxation."**

Counsel for the City of Detroit further argued (Pages 9 and 10):

> "License taxes, **privilege taxes** and occupation taxes **are specific** taxes and **not ad valorem** taxes **upon property.** *C. F. Smith v. Fitzgerald, supra.*

At the oral argument on November 14, 1957, Mr. Roger O'Connor, Assistant Corporation Counsel for the City of Detroit, was asked whether the tax in the *Murray* case and the tax under Act 189 (the privilege tax) involved in the *Borg-Warner* case were in effect and substance the same. Mr. O'Connor was most careful to point out that the tax in the *Murray* case was an ad valorem property tax in contradistinction to the tax imposed by Act 189, which was a privilege tax for the privilege for use.

This is precisely what the attorneys for the taxing authorities in the *Continental* case contended in their brief and argument before this Court, No. 37-8. At Page 14 of their brief they state—

> "**Property taxes** are regarded as a tax '**against the property as a thing,**' whereas Act 189 imposes a purely personal liability upon the lessee or user. . . .
>
> "Property taxes almost invariably become a lien upon the property which is the subject of the tax and the property is the thing looked to for collection. The tax imposed by Act 189 becomes 'a debt due from the lessee or user' recoverable **only** in an action of assumpsit."

Thus, from the beginning to the end of the litigation, Counsel for Appellants and other taxing authorities urged the basic distinction between the Michigan ad valorem property tax and privilege taxes, such as Act 189.

The requirements of ordinary due process and common fair play should impel the majority of this Court to afford the Appellee and the Federal Government the opportunity to fairly present their arguments and authorities on this issue—not squarely before the Court at any time prior to this—particularly in a case of such far reaching importance (the impact of which (we are advised) will exceed $400,000,000 a year on the Federal Government).

We are confident that the majority of this high Court after such argument would not conclude—from implication and adding language to the Michigan tax laws—that the ad valorem property taxes here in question are privilege or specific taxes. To conclude that such taxes are privilege or specific taxes ignores the plain language of the tax statutes and obliterates and overrides basic and fundamental tax concepts prescribed by the Michigan Constitution (which in its present form (regarding taxes) has been in effect for over a hundred years). We are convinced that upon square presentation of this issue upon rehearing this Court will not conclude that the difference between the ad valorem property tax in Michigan and a specific or privilege tax for use or possession such as was involved in Act 189 in the *Borg-Warner* case were "empty formalisms."

2.

(a) The distinction in Michigan between an ad valorem property tax and a specific (privilege) tax for "using or possessing" property is basic and fundamental under the Michigan Constitution and Michigan decisions thereunder and is not an "empty formalism";

(b) To hold otherwise, as is done by the majority opinion, is to do violence to and to obliterate the express provisions and mandate of the Michigan Constitution and long line of Michigan decisions in effect for over 100 years and to overrule a long line of decisions of the United States Supreme Court.

Under the **Constitution of Michigan** there are two general methods of taxation—ad valorem and specific. *Pingree* v. *Auditor General*, 120 Mich. 95, 108 (1899); *C. F. Smith Co.* v. *Fitzgerald*, 270 Mich. 659, 673 (1935).

One of the definitions of ad valorem taxes, given in the *Pingree* case (p. 99), supra, which is similar to that given in *Cooley on Taxation*, Vol. 1 (4th Ed.) p. 143, is:

> "Ad valorem—according to value—* * * An ad valorem tax is a tax or duty upon the value of the article or **thing subject to taxation."**

License taxes, **privilege taxes** and occupation taxes **are** specific taxes and **not ad valorem** taxes **upon property.** *C. F. Smith* v. *Fitzgerald*, supra (672-3).

That this is a basic and fundamental concept of taxation under the Constitution of the State of Michigan—not mere "empty formalism"—cannot be denied by Appellants. The **foregoing is the very contention made to this Court by the City of Detroit** and is **quoted verbatim** from its brief filed with this Court in the *Borg-Warner* case, No. 26 (pages 8-9; see supra, page 8 hereof). To the same effect see brief of tax authorities in *Continental* case, supra, page 9. And that is the very contention we made in our brief before this Court (pages 92-93).

Article X, Section 3, of the Constitution of the State of Michigan of 1908 provides and makes it mandatory that all taxes—except specific taxes—be uniform (Vol. 1, M.S.A., p. 409). This is the same provision which was contained in Article XIV, Sec. 11, of the Constitution of the State of Michigan of 1850 (Vol. 1, M.S.A., p. 184). Specific taxes are separately and differently dealt with under Article X, Section 4, of the Constitution of 1908. (Vol. 1, M.S.A., p. 414). See Article XIV, Sections 1 and 10 of the Constitution of 1850 (No. 1, M.S.A., pp. 183-4).

The basic distinction between ad valorem taxes **on property** and specific or privilege taxes was known to the constitutional convention of Michigan in 1850 and the difference was woven and ingrained into the basic constitutional law of the State of Michigan. That this is so was held by the Michigan Supreme Court in the leading case on the subject, *Pingree* v. *Auditor General*, 120 Mich. 95 (1899), wherein Governor Pingree, of the State of Michigan, raised this very basic and fundamental question. The Supreme Court of Michigan said:

> "We have only to examine the statutes in force at the time the Constitution was adopted, to see that **the term 'specific tax' was known and applied in this State previous to the meeting of the constitutional convention.** (page 100) . . .
>
> " . . . In view of these laws, some of which continued in force after the adoption of the Constitution, we are satisfied that **the convention understood the meaning** of the term 'specific taxes,' and used it in no other than the common and well-settled sense of the term . . . (page 101) . . .

"If the tax in this case is clearly an ad valorem tax, if it is a tax on property,—and this cannot be questioned, be-

> cause the title and the act both call it a tax on telegraph lines, which are property,—there is **nothing in the law to indicate that an occupation tax or tax upon business was intended,** even were we to hold that its ad valorem feature would not necessarily preclude its being denominated a specific tax. (page 102)
>
> . . . .
>
> "It appears to me impossible to read the definition of the lexicographers and the decisions of the courts without reaching the conclusion that the **terms 'specific tax' and 'ad valorem tax' have a well-defined meaning; and in the Constitution of this State,** as well as in the **statutes** and decisions, **these definitions are clearly recognized.** Concise definitions are given in 25 Am. & Eng. Enc. Law, 17, notes 2, 3, and Cooley, Tax'n (2d Ed.), 238." (p. 109)

And this basic principle and distinction so enunciated in the *Pingree* case was again forcefully enunciated in *C. F. Smith Co.* v. *Fitzgerald*, 270 Mich. 659, supra, at 672, 673 (1935).

Article X, Section 21 of the Michigan Constitution of 1908 also contains a basic and fundamental limitation regarding ad valorem taxes providing, among other things, that—

> "the total amount of taxes **assessed against property** for all purposes in any one year shall not exceed 1½% of the assessed valuation of said property . . . "

(Vol. 1, M.S.A., 1957 Cum. Supp., p. 173). This constitutional limitation as to the extent of ad valorem **property taxes "against property"** has been deemed to be an important safeguard for taxpayers. See numerous decisions in Michigan relating thereto (Vol. 1, M.S.A. pp. 426-428, 1957 Supp., pp. 173-178). Surely, this constitutional provision relating to ad valorem property taxes—as distinguished from specific taxes—is fundamental and not a mere "empty formalism."

This difference is also recognized as a basis for the allocation of funds for State purposes, under Article X, Sec. 1 of the Constitution of 1908, (see footnote and decisions, 1 M.S.A. p. 407, and 1957 Supp. p. 163; also see footnotes regarding other bases for the distinction in re The General Property Tax Act here in question, 6 M.S.A., Sec. 7.1, under heading "Cross References").

The very title to the Michigan General Property Tax Law states in unequivocal language that the **sole object** of the statute is—

> "An act to provide for the **assessment of property** and the levy and collection of **taxes thereon** . . . "

and not a privilege tax or tax upon the person.

Article V, Section 21, of the Michigan Constitution of 1908 (1 M.S.A., Page 303), provides:

> "Section 21. No law shall embrace more than **one object, which shall be expressed in its title."**

Under this constitutional provision the operation of a statute must be restricted to the object expressed in the title, and **the scope of the title of an act cannot be enlarged by the courts.** *Vernor* v. *Secretary of State*, 179 Mich. 157; *American Baptist Missionary Union* v. *Peck*, 10 Mich. 341; *Ryerson* v. *Utley*, 16 Mich. 269; *Arnold* v. *Ogle Construction Company*, 333 Mich. 652.

Section 1 of the Michigan General Property Tax statute provides:

> "(6 M.S.A. Sec. 7.1) **Property** Subject to Taxation. Section 1. The People of the State of Michigan enact, that all **property**, real and **personal, within the jurisdiction of this state,** not expressly exempted, shall be **subject to taxation."**

The **subject** of the tax is the **property,** not the person owning or possessing it.

The difference between a tax for the "privilege of using or possessing," (such as Mr. Justice Black suggests by implication, is the character of the Property Tax in Michigan) and the **ad valorem property tax, upon the property itself** is a basic Michigan constitutional distinction, which must be observed in Michigan. In a case involving a Michigan privilege tax law for the privilege of "use, possession, or storage," The Michigan Supreme Court pointed out in *Banner Laundry v. State Tax Board*, 297 Mich. 419, at 429:

> "The **use tax is an excise tax (as contra-distinguished from an ordinary property or ad valorem tax)** imposed on the privilege of using . . . tangible personal property . . . located in this State . . . It follows that **this excise tax or privilege tax is not subject to** the above quoted **Article X, Section 21,** of the **Constitution,** because it is not a tax **'assessed against property,'** but instead is a specific tax."

To hold, by implication, as did the majority of the Court in the Murray case, that the general property ad valorem tax is in effect a specific or privilege tax for use or possession, and that the distinction between the ad valorem taxes on property and specific or privilege taxes for use or possession are "empty formalisms" means that five Justices of this Court, (who seldom, if ever before, have had occasion to consider the Michigan General Property Tax Law) must **override, obliterate and nullify—**

> (a) a basic and fundamental concept of taxation woven into the fabric of Michigan's Constitution since 1850;
>
> (b) the express object and language of Michigan's general ad valorem tax law on property which has been in effect in substantially its present form for over 100 years;
>
> (c) the interpretation and decision of the basic constitutional distinction between ad valorem property taxes on property and specific or privilege taxes by the Supreme Court of Michigan for over sixty years, and

(d) a long line of decisions of the United States Supreme Court.

The framers of the Michigan Constitution in 1850, the legislators of the State of Michigan and the Michigan Supreme Court Judges, construing the Constitution and the tax laws, throughout the years considered the difference between the two types of taxes basic and fundamental. They did not regard the distinctions as "empty formalism."

The Supreme Court of the United States, in one of its leading cases which involved the distinction between a direct tax on property and an excise or privilege tax, measured by the value of the property—*Flint* v. *Stone Tracy Co.*, 220 U.S. 107, held, at page 150:

> "The Pollock case construed the tax there levied as direct, because it was imposed **upon property** simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or **doing business** in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The **difference** between the acts **is not merely nominal,** but rests upon **substantial differences** between the **mere ownership of property** and the **actual doing of business** in a certain way."

See statements to the same effect at page 147, and at 165.

This same distinction was recognized and followed as basic in determining the question of immunity from state taxation in *Pacific Co.* v. *Johnson*, 285 U.S. 480, at 490-491, following *Flint* v. *Stone Tracy Co.* See, *Plummer* v. *Coler*, 178 U.S. 115. More recently, the Court, in *Tradesmen's National Bank of Oklahoma* v. *Oklahoma Tax Commissioner*, 309, U.S. 560, recognized the basic distinction in *Flint* v. *Stone Tracy* and *Pacific Co.* v. *Johnson*, at page 565. It is significant that in the **Tradesmens Bank** case two of the **Justices (Black and Douglas)** who, in the majority opinion in the *Murray* case at bar, now suggest that the differences between the Michigan ad valorem property tax on property and a privilege tax for the privilege of using or possessing the property constitute "empty formalisms" there recognized by their concurrence that—

> "The difference . . . **is not merely nominal,** but rests upon **substantial differences** between the mere ownership of property and the doing of business in a certain way."[2]

Compare *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 499; *United States* v. *Allegheny*, 322 U.S. 174.

This same distinction appears in a number of United States Supreme Court cases, too numerous to cite, and if the majority opinion in the *Murray* case stands, the principles of constitutional law enunciated by this Court in those cases must, of necessity, be shunted into limbo.

3.

By admittedly adding language to the General Michigan and Detroit ad valorem property tax laws, the majority of the Court have taken upon themselves the complete revision of the Michigan Constitution (with respect to taxation) and the property tax laws.

In addition to the provision of Article V, Section 21, of the Michigan Constitution of 1908, which requires that no law shall embrace more than **one object, which shall be ex-**

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[2] Hanneford v. Silas Mason Co., 300 US 577, 582, cited in the majority opinion, is not valid support for the proposition that there is no basic distinction between ad valorem property taxes and privilege taxes. It was there held (pp. 582-3) that since the State tax—whether a privilege tax for use or a property tax upon property—did not become operative until **the goods had come to rest in the taxing state,** that, therefore, there could be no violation of the Commerce Clause. The nature of the tax was immaterial to the decision. On the other hand, the distinction between the two types of taxes —whether or not the **tax is upon** government owned property—is important in deciding the question of constitutional immunity of government-owned property from State taxation, as this Court has held in decisions cited above.

pressed in its title, supra, page 13, Article X, Section 6, of the Michigan Constitution of 1908 (1 M.S.A. 416), provides that—

> "Section 6. Every law which imposes . . . a tax **shall distinctly state the tax,** and the **objects** to which it is to be applied; . . .".

The Michigan General Property Tax Law state "distinctly state(s) the tax" in its title to be an **"assessment of property . . . taxes thereon."** By implication and adding language thereto this Court is overriding this constitutional injunction of the State of Michigan and is changing an act "for the **assessment of property** . . . collection of **taxes thereon",** which tax is distinctly stated, into a tax "for the privilege of using or possessing property" which is not stated in the title or any other part of the act.[3]

4.

The privilege tax imposed under Act 189 in the Borg-Warner case is basically different from the ad valorem property taxes in the Murray case and counsel for the City of Detroit and City of Muskegon expressly so urged in their briefs and at the oral argument.

Counsel for the City of Detroit, in the Borg-Warner case, recognized and urged the basic distinction between the privilege tax imposed under Act 189 for the privilege of using property and an ad valorem tax upon the property itself under the Michigan Constitution and a number of leading Michigan decisions thereunder. See the pertinent quotations from the brief of the City of Detroit (Appellants in the Murray case) hereinabove, supra, page 8.

---

[3] The tax in the Murray case was not an ad valorem tax upon Murray's "possessory interest" since the assessment was at the full value of the property—not merely on such limited "possessing interest", if it had any value at all. Furthermore, it has not been claimed that a possessory interest may be taxed in Michigan under the General Property Tax Act.

If the General Property Tax Law of Michigan in effect and substance permitted the State of Michigan to impose a tax upon a private user or possessor of Government-owned property—for the privilege of use or possession thereof—then why was Act 189 deemed necessary by the Michigan Legislature, and why did the Supreme Court of Michigan in the Borg-Warner case, 345 Mich. 601, go to such great lengths to distinguish the privilege tax imposed under Act 189 from ad valorem property taxes upon the property? The differences, as have been pointed out hereinbefore, are basic, fundamental and constitutional, and are not "mere empty formalisms".

Furthermore, it is to be noted that under Act 189, or similar privilege tax acts, the tax is imposed upon the user or possessor for the privilege of such use or possession. Such user or possessor is obligated to pay the tax for such privilege or use and may not proceed against the owner thereof for the collection of the tax so paid by him. This point was specifically made by Mr. Justice Black speaking for the majority in the Borg-Warner case, when he said:

> "The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. **Any taxes due under the statute are the personal obligation of the private lessee or user.** The **owner is not liable** for their payment **nor is the property itself subject to any lien** if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury."

Under the General Michigan Property Tax Law in question in the Murray case, however, the statute specifically provides for the assessment of personal property at the place "in which the **owner resides**" (Mich. Stat. Ann., Sec. 7.13),

except where the owner is a nonresident, in which event the **assessment** is made **to the person in Michigan in possession** or control, **with a right of recovery against** the **owner,** secured by a **lien** on the property (6 Mich. Stat. Ann., Sec. 7.14, Pra. Seventh).

The City of Detroit Charter has a provision substantially to the same effect. See Appendix E in our Brief before this Court.

This right of collection from the owner by the person in possession, with a security to him of a lien upon the assessed property until the collection has been effected, has been expressly recognized in *Detroit Shipbuilding Co.* v. *City of Detroit*, 228 Mich. 145, 148.

By what authority is Murray's right to a first lien upon the Government-owned property assessed, as expressly provided in the statute, denied to it? And, if not denied, then there will be a statutory lien under the law upon Government-owned property and a statutory right afforded to the person in possession to collect from the United States Government.

The fact that the City of Detroit devised a stamp to place upon its assessment roll "subject to prior rights of Federal Government" is not pursuan. to authority of the Michigan taxing statute, but is directly contrary thereto. M.S.A., Section 7.81, specifically provides—

> "The personal property taxes hereafter levied or assessed by any city or village shall be a **first lien, prior, superior** and **paramount to any other claims, liens and encumbrances whatsoever** upon the personal property assessed . . . ."

This same claim that the lien of the County was subordinate to the interest of the United States was made in *Allegheny*— and rejected by this Court.

5.

The assessing offices of Detroit and Wayne County, in practice, in this very case did not attempt to assess Murray for the "privilege of using or possessing" Government-owned property under the general property tax laws here in question.

It is significant indeed that the taxing authorities of the City of Detroit and the County of Wayne never conceived or in administrative practice claimed that Government-owned property, used or possessed by a private contractor, would be subject to assessment under the Michigan General Property Tax Law. In Murray—

> "**Tools already owned and furnished by the United States** Government to appellee Murray under a separate facilities contract **were not assessed** and therefore are not involved in this dispute (Stipulation No. 1 (3), R. 82).
>
> "**Tools built and completed by Murray** under its subcontracts on which there had been inspection at the plant prior to January 1, 1952 for use there in performance of said subcontract **were not included in the assessments.**

(See Appellants Brief, pages 15 and 16).

The value of these tools probably exceeded the assessed value of the materials, taxed, which is the subject of this litigation. Surely the assesing officers who knew of the use of such property (finished tools and facilities) by Murray would have assessed Murray for the privilege of use or possession if they had considered that they had a right so to do under the General Michigan Property Tax Law. Neither the City nor the County can deny that their assessing officers never made any assessments for the use or possession of Government-owned property in any of the many large plants in Detroit or Wayne County. Such completed Government-owned and furnished property has been and is being used in such contractor's plants. The value of such materials in these large plants in this great industrial area runs into hundreds of millions of dollars.

This has been the continuous interpretation in application of the General Michigan Property Tax Law by the taxing officials throughout the years. This Court has on numerous occasions held that the interpretation placed upon a tax law by those charged with the administrative duty and responsibility of applying those laws—continuously followed for a long period of time—should be given great weight. This is particularly true where this practice is woven into the basic Constitutional law of the State and into a long line of Michigan and United States Supreme Court decisions, *Commissioner* v. *South Texas Lumber Co.* 333 U.S. 496, 501; *Boyer-Campbell Co.* v. *Fry* 271 Mich. 282, 296-7.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, the judgment of the United States Court of Appeals for the Sixth Circuit be affirmed.

Victor W. Klein
William M. Saxton
Attorneys for Appellee,

The Murray Corporation of America.

March 14, 1958.

CERTIFICATE OF COUNSEL

I, Victor W. Klein, attorney for the above-named Appellee, The Murray Corporation of America, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Victor W. Klein

Attorney for Appellee,

The Murray Corporation of America.

18

NOS. 18
36

343

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Nos. 18, 36 and 343

In the Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, ET AL., APPELLANTS AND PETITIONERS

v.

THE MURRAY CORPORATION, ETC., AND THE UNITED STATES OF AMERICA

ON APPEAL AND ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 343

AMERICAN MOTORS CORPORATION, ETC., AND THE UNITED STATES OF AMERICA, APPELLANTS

v.

CITY OF KENOSHA, ETC.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

PETITION FOR REHEARING

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

INDEX

Page

Introduction 2

I. The controlling issues decided by the Court were never litigated either here or below 5

II. The property taxes involved were not in their operation and effect the same as would have been valid privilege taxes 6

III. The holdings are contrary to the State law of both Michigan and Wisconsin 8

IV. As upheld by this Court, the tax statutes discriminate against Federal property 11

V. The decision throws into confusion past and future arrangements between the United States and private parties and creates a potential retroactive tax liability of over a billion dollars 13

VI. To modify these decisions would not affect the power of the States to tax with respect to tax-exempt property but simply require them to do so deliberately 16

Conclusion 17

CITATIONS

Cases:

Avco Mfg. Corp. v. *Connelly*, Conn. Supreme Court of Errors, decided April 1, 1958 11

McCulloch v. *Maryland*, 4 Wheat. 316 13

State ex rel. Reconstruction Finance Corp. v. *Sanlader*, 250 Wis. 481, 27 N. W. 2d 447 10

In the Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, ET AL., APPELLANTS AND PETITIONERS

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ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

PETITION FOR REHEARING

The Solicitor General, on behalf of the United States, respectfully petitions for rehearing in these cases, for the reasons stated below.

INTRODUCTION

In a group of three cases decided March 3, 1958,[1] the Court has established the principle that a State may, without impairing the Federal Government's constitutional immunity from state taxation of its property, tax private parties on the privilege of using government property in connection with a private business conducted for profit. At the outset we emphasize that the Government does not challenge the correctness of that principle, nor ask the Court to reexamine the broad constitutional issue involved in these cases.

This petition for rehearing is directed, rather, to whether the particular Michigan and Wisconsin statutes involved in the *Murray* (Nos. 18 and 36) and *American Motors* (No. 343) cases, as those statutes have been and are applied, are valid on the assumption that they are the equivalent of privilege taxes on the use of Government-owned property. The Court recognized that the Michigan statute involved in the *Murray* case was not in form a tax on the privilege of using exempt property but concluded that in its practical operation and effect it was identical to a privilege tax, and therefore held it valid. The Court considered that the form of the tax did not alter its substance, and that to strike down the tax "because of such verbal omission would only prove a victory for empty formalisms." (355 U. S. at 493.)

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[1] *United States* v. *City of Detroit*, 355 U. S. 466; *United States* v. *Township of Muskegon*, 355 U. S. 484; *City of Detroit* v. *Murray Corp.*, 355 U. S. 489. On March 10, 1958, the Court affirmed, *per curiam*, the judgment of the Supreme Court of Wisconsin in No. 343, *American Motors Corp.* v. *City of Kenosha*.

1. The conclusion that the Michigan tax in the *Murray* case could be treated as if it were, in substance, a valid privilege tax apparently seemed to the Court to be a self-evident proposition. The Court reached this conclusion without having had the benefit of briefs or arguments of counsel. No party in this Court or in any of the lower courts briefed or argued the question of whether the difference between the *ad valorem* personal property taxes involved and a privilege tax on the use of tax-exempt property was simply one of form. All parties assumed that the differences were significant and substantial. We respectfully submit that the question is one which should not be decided by the Court without having the relevant facts or the legal considerations which briefing and argument on this issue would produce.

2. The conclusion that the *ad valorem* personal property taxes here involved were in operation and effect the same as a valid privilege tax is, we submit, clearly erroneous. Under the Michigan statute, as applied, the property tax is collected from different persons and in different amounts than would be the case under a valid privilege statute.

3. In holding that the Michigan and Wisconsin statutes authorize the imposition of a tax on a person in possession of Government-owned property, the Court has overruled the courts of both states on a matter of state law. It was stipulated in the *Murray* case that no tax was assessed against the private corporation with respect to tools concededly owned by

the United States. The Wisconsin courts have explicitly held that the Wisconsin statute does not impose a tax on a person in possession of tax-exempt property. Although this Court has held that the states have the power to tax with respect to such possession, it should not hold that the states have in particular taxing statutes already done so where the states have construed those very statutes as not doing so.

4. To uphold the Michigan and Wisconsin statutes on the assumption that they are in effect the same as privilege taxes on the use of exempt property would bring about a discrimination in these states against the Federal Government. In neither Michigan nor Wisconsin is the possessor or user of any other kind of tax-exempt personal property assessed with respect to such property. On the basis on which they were upheld by the Court, these taxes fall on only one kind of tax-exempt property—that owned by the Federal Government. But the Court's opinion in the companion case recognized that a tax would be invalid which "operates so as to discriminate against the Government or those with whom it deals". *United States* v. *City of Detroit,* 355 U. S. 466, 473.

5. The Court's decision throws into confusion the tax aspects of thousands of arrangements made in the past between the United States and private parties engaged in activities on its behalf. By finding that an *ad valorem* property tax, which had never previously been so construed by the State, could be collected from persons who had been in possession of Government-owned prop-

erty on tax day, the decision may subject the United States and private parties to retroactive tax liabilities of more than a billion dollars.

6. Modification of the decision in these cases would not affect the broad constitutional principle that the States have power to tax private parties for the privilege of using federal property. Our submission here is simply that the decision of whether or not to exercise such power, and to impose such taxes, is one for the state legislatures to make, and that *ad valorem* property taxes which do not represent an exercise of such state power are not to be upheld and retroactively applied by disregarding their terms and treating them as if they were, in fact, valid privilege taxes deliberately enacted as such by the state legislatures, and uniformly and nondiscriminatorily applied as such by the local taxing authorities.

I. THE CONTROLLING ISSUES DECIDED BY THE COURT WERE NEVER LITIGATED EITHER HERE OR BELOW

As the Court is aware, the *Murray* case was decided on a ground not argued or presented by either side. The litigated question was whether the property was owned by the United States or whether the Murray Corporation had such ownership interests in the property that a property tax could be assessed against it. On this issue, all members of the Court concluded or assumed that the United States owned the property.

The Detroit taxing authorities recognized that a tax could not be assessed with respect to the property if it were held to be the property of the United States. Other tools in the possession of the Murray Corporation which were concededly owned by the United States were not taxed. The Government therefore had no occasion to call to the Court's attention the many factual and legal differences between the practical operation and effect of the property tax statute involved here and what would have been the operation and effect of a statute which imposed a tax with respect to the privilege of using tax-exempt property.

Whether the difference between an *ad valorem* personal property tax and a privilege tax on the use or possession of property is, as applied to private parties using property of the United States, merely a nominal, verbal difference which, as a practical matter, should properly be disregarded by the Court, or whether the difference is indeed a real, substantial one, having significant legal and factual consequences, is a question that has not yet been briefed or argued in any court. Had it been briefed and argued, this Court might well have reached the conclusion—which the Government believes to be correct—that there are substantial, and constitutionally material, differences between the two types of taxing statutes, at least as applied in these cases. At all events, we respectfully submit, the question is one that should not be decided by the Court on the assumption that the answer is so obvious as not to require briefing and argument.

II. THE PROPERTY TAXES INVOLVED WERE NOT IN THEIR OPERATION AND EFFECT THE SAME AS WOULD HAVE BEEN VALID PRIVILEGE TAXES.

The basic premise of the Court's decision in the *Murray* case is that—

> In their practical operation and effect the taxes in question are identical to those which we upheld in Nos. 26 and 37 on persons using exempt real property [355 U. S. at 493].

We submit, however, that neither the Michigan nor the Wisconsin statute is, in its practical operation and effect, the same as would be a valid tax on the privilege of using tax-exempt property in connection with a business conducted for profit.

The taxes are not in fact applied generally against persons in possession of tax-exempt property. Under the laws of Michigan, as construed by Detroit at the time of the assessments involved, no person in possession of concededly tax-exempt property was taxed because of that property. A valid, non-discriminatory tax on the use of tax-exempt property would have affected all such persons. This statute did not. The only reason the materials here involved were assessed was that Detroit erroneously believed that they were owned by the Murray Corporation. But this single assessment did not alter the general construction by Michigan of its own statute. Detroit did not purport to apply this tax as it would have applied a privilege tax on the use of all tax-exempt property. Even as to Murray the tax was not applied as would have been a valid privilege tax. It is stipulated in the record that tools owned by the United States were not assessed even though they "remained in the possession of plaintiff Murray for its use in production of goods under the subcontracts in question" (R. 82).

The same is true of the Wisconsin statute involved in *American Motors*. The *ad valorem* property tax statute under which the assessments were made was not construed so as to tax persons who used or possessed tax-exempt property. The assessment made by Kenosha was made only on the theory that American Motors owned the property.

III. THE HOLDINGS ARE CONTRARY TO THE STATE LAW OF BOTH MICHIGAN AND WISCONSIN

In holding that the Michigan and Wisconsin taxing statutes are to be upheld as the equivalent of privilege taxes, the Court, we submit, has construed these statutes in a manner contrary to the laws of those states, as authoritatively declared by their highest courts.

The petition for rehearing filed by the Murray Corporation cites numerous authorities showing that in Michigan the distinction between a property tax and a privilege tax is a constitutional one, that under the state constitution there are restrictions which apply to one kind of a tax but not to the other, and that a single statute could not have the two objectives of imposing a tax on property and establishing a privilege tax. Also, as indicated above, this Court, in construing the Michigan statute as if it were one which imposes a tax on the privilege of using tax-exempt property in connection with a business conducted for profit has departed from the construction placed upon it by the state, which does not apply the statute in that fashion, and does not collect taxes from other persons who use tax-exempt property.[2]

Similarly, the *American Motors* decision is contrary to Wisconsin law. The Court in the *Murray* case assumed that "full title to the property not just a bare security interest" was in the United States (355 U. S. at 492, fn. 2). In affirming the judgment of the Supreme Court of Wisconsin in *American Motors* on this assumption, the Court held that the City of Kenosha had the legal right to collect a tax from the person in possession of aircraft parts and materials owned by the United States. But the extent of the taxing power of Kenosha is also a question of Wisconsin law. And in this very case the state courts of Wisconsin held that, as a matter of Wisconsin law, "if the title to the property * * * was at the time of each respective assessment in the government then * * * such assessment is invalid" (Jurisdictional Statement, p. 20). The Supreme Court of Wisconsin accepted this construction of the state statutes and said:

> We are therefore concerned only with the question whether the Company or the Govern-

---

[2] The state has applied the property tax statute as imposing a tax "on property", and has therefore not imposed it with respect to admittedly exempt property. As the Court recognized, "Michigan expressly exempts from taxation all public property belonging to the United States * * *" 355 U. S. at 492.

> ment was the true owner of the property involved [Jurisdictional Statement, p. 34].

Once it is concluded that the ownership of the property was in the United States, there is no ambiguity as to how the Wisconsin statutes would then be applied by the courts of that state. If the Government owned the property, Wisconsin law imposes no tax against the person in possession. Accordingly, if this Court accepts, as it apparently does, the premise that the United States owned the property, it can not affirm the judgment below in *American Motors* without overruling the Wisconsin courts on a question of Wisconsin law.

As this Court has now held, Wisconsin has the constitutional power to impose a tax on persons in possession of Government-owned property. But the Wisconsin statute has been construed by its courts not to exercise that power. The situation is comparable to that which existed in *State ex rel. Reconstruction Finance Corporation* v. *Sanlader,* 250 Wis. 481, 27 N. W. 2d 447, where the state Supreme Court held that machinery and equipment owned by the R. F. C. were not taxable under the then-existing Wisconsin legislation even though Congress had waived the implied constitutional immunity as to them. Similarly, the Connecticut Supreme Court of Errors has unanimously held, within the past two weeks, that, notwithstanding the decisions of this Court on March 3, 1958, a contractor is not subject to the state use tax with respect to property owned by the United States since under state law the use of property, to be subject to the use tax, must be incident to ownership. *Avco Mfg. Corp.* v. *Connelly,* decided April 1, 1958.

Any possible doubt as to the proper construction of the state laws here involved is removed by the *amicus* brief filed in the *Murray* case by the City of Kenosha. There Kenosha recognized that, if the Court found that there was an ownership interest in the United States, the bulk of the property would not be taxable, the city suggesting that it might still be allowed to tax those few excess items which would never be turned over to the Government, since as to these, it was argued, the Government acquired no ownership interest (p. 8).

IV. AS UPHELD BY THIS COURT, THE TAX STATUTES DISCRIMINATE AGAINST FEDERAL PROPERTY

In its opinion in *Murray* the Court stated that—

> There is no claim that the challenged taxes discriminate against persons holding government property. To the contrary the tax is a general tax which applies and has been applied throughout the State. * * *
>
> * * * * *
>
> There was no discrimination against the Federal Government, its property or those with whom it does business [355 U. S. 494, 495].

But no such claim of discrimination was made because, throughout this entire case from beginning to end, the local authorities have recognized that, under the taxing statutes here involved, property owned by the United States is not subject to assessment. As already noted, the principal issue litigated in this Court and below was whether the property here assessed was owned by the United States or by the Murray Corporation.

In upholding the validity of Michigan's Public Act 189 of 1953 the Court recognized it as important that the tax fell on the users not only of Federal real property but of other types of tax-exempt real property as well:

> But here the tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities. * * * Nor is there any showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed [*United States* v. *City of Detroit,* 355 U. S. 466, 473, 474].

No such statements and no such showing can be made with respect to the Detroit personal property tax. Unlike the statute to which the Court referred above, Michigan has not assessed its personal property tax against persons in possession of state-owned or charity-owned tax-exempt property. As applied here and upheld by this Court, the Michigan tax is imposed on persons in possession of personal property that is tax-exempt because it is owned by the United States, but not on persons who possess property which is tax-exempt for any other reason. Even under the narrowest construction of *M'Culloch* v. *Maryland*, 4 Wheat. 316, a state tax which is so discriminatory against the United States is invalid.

V. THE DECISION THROWS INTO CONFUSION PAST AND FUTURE ARRANGEMENTS BETWEEN THE UNITED STATES AND PRIVATE PARTIES AND CREATES A POTENTIAL RETROACTIVE TAX LIABILITY OF OVER A BILLION DOLLARS

Looking to the future, the approach taken in the *Murray* case appears to raise most serious problems in the conduct of the Government's activities in relation to private contractors and others engaged in work on its behalf. Governmental decisions must be made on the basis of reliable estimates as to the tax consequences of alternative arrangements. Looking to the past, the consequences of the *Murray* decision seem far-reaching. Although it is impossible to predict with accuracy the tax consequences of the decision, any estimate turns on some basic data as to the amount of Government property in the hands of private contractors. The following table indicates the best estimates of the larger Department of Defense and Atomic Energy Commission items:

Some Government property in possession of private contractors

	Estimated value (in some cases, cost)
Department of Defense:	*Billion*
Defense plants (236) used by private contractors	$2.5
Machine tools	1.4
Jigs and fixtures	.6
Related production equipment (lift trucks, cranes, etc.)	1.3
Test equipment	.2
Materials, work in process, etc. (as in *Murray* case)	5.0
Total Defense	11.0
Atomic Energy Commission:	
Land, buildings, structures and utilities	3.3
Equipment	3.3
Inventories in process of production, etc	1.7
Total AEC	8.3
Total of above	19.3

The above table omits large categories of property—all that which is administered by branches and agencies of the Government other than the Department of Defense and the Atomic Energy Commission—but does include large amounts of property in the hands of contractors where the Government will contend that they are acting as agents or instrumentalities of the United States. In estimating the possible tax liability which may be imposed on those private persons who now have or previously had this property in their possession, we are informed that a conservative estimate would be an effective tax of 2% on real property and 4% on personal property. On this basis if all of the property listed, and no other, were subject to tax the tax would be some 658 million dollars per year. If all of the Atomic Energy property were immune and state taxation were limited to defense plants, tools, equipment and materials comparable to that involved in the cases decided by the Court on March 3d, the tax would be some 389 million dollars per year.

The *Murray* opinion appears to hold that under a regular *ad valorem* property tax statute a state may collect from a person in possession of Government-owned property on assessment day an amount equal to the regular property tax—even though the statute had never before been construed by the state as authorizing the collection of a tax from a person in possession of tax-exempt property. The *Murray* decision may thus permit the retroactive taxation of private contractors who in prior years used government-owned property in connection with a business conducted for profit. The taxes might be collectible for several years back or more. In many jurisdictions a statute of limitations never runs unless an appropriate return has been filed. Assuming a three-year statute of limitations, a billion dollars would appear to be a minimum estimate of the potential retroactive tax liability.

This colossal burden would fall in part upon the Government of the United States because there are some outstanding contracts requiring government reimbursement of state taxes. But in large part, we believe, the burden would fall upon private contractors. As to thousands of these the contract obligations on both sides have been closed. As to many others, the contracts contain no provision for reimbursement, since no party to the transaction—and certainly not the state—contemplated such a tax liability. The amount of the tax would in many cases exceed the total fee which the contractor received in connection with his use of the government property. The back taxes might bankrupt some existing enterprises.

VI. TO MODIFY THESE DECISIONS WOULD NOT AFFECT THE POWER OF THE STATES TO TAX WITH RESPECT TO TAX-EXEMPT PROPERTY BUT SIMPLY REQUIRE THEM TO DO SO DELIBERATELY

The *Borg-Warner* and *Continental* decisions establish the power of the states to tax the privilege and advantage which a private person gets from the use of tax-exempt property. To grant a rehearing in the *Murray* and *American Motors* cases, or to modify the decisions there, would not throw in question the right of the states to make assessments under privilege statutes now on the books and to adopt others in the future. It would at most mean that the states would have to enact legislation which indicated whom they were going to tax and because of what.

A decision whether or not to tax the use of exempt property is for the state legislature to make. A state, to encourage the location of Government-owned installations or for other reasons, may not choose to tax those who use them. To the extent that the tax is on private individuals, for a privilege which they have, it should be accomplished by action of the legislature in which those individuals have a voice. It is well within the realm of possibility that the Michigan legislature would decline to add the "few words" to its statute which would make it a valid privilege tax. In fact, as the Court knows, the Michigan legislature considered the problem of taxing the users of tax-exempt property but chose to enact a statute applying only to users of real property. The fact that Michigan could have adopted a statute under which the Murray Corporation might have been assessed with respect to tax-exempt materials and tools only highlights the fact that Michigan did not do so.

CONCLUSION

For the reasons stated, this petition for rehearing should be granted.

Respectfully submitted.

J. Lee Rankin,
Solicitor General.

CERTIFICATE OF COUNSEL

As required by Rule 58, I certify that this petition is presented in good faith and not for delay.

J. Lee Rankin,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 18 and 36

CITY OF DETROIT, ET AL.,
Appellants and Petitioners,
vs.
THE MURRAY CORPORATION, ETC., and
THE UNITED STATES OF AMERICA

ON APPEAL AND ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO PETITIONS FOR REHEARING OF GOVERNMENT AND APPELLEE

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INDEX

Page

Introduction 1

I. Controlling issues decided by this Court were litigated here and below.................... 6

II. Property taxes involved were in their operation and effect and as applied, so far as constitutional immunity of the Government is concerned, no different than privilege taxes.. 7

III. The holdings are not contrary to the State laws of Michigan........................ 8

IV. As upheld by this Court, these tax statutes do not discriminate against federal property... 9

V. Speculations as to inconvenience or added cost, if any, to Government or private parties, are not grounds for rehearing or reversal 10

VI. To modify the decision in Murray in the manner suggested would nullify the basic constitutional principle upon which it rests.. 12

Conclusion 13

Appendix 1a

INDEX OF AUTHORITIES

Cases: Page

Alabama, State of v. King and Boozer, 314 U. S. 1 4
Auditor Gen'l v. Women's Temperance Ass'n, 78 N. W. 466 8
Commissioner of Int. Rev. v. Tower, 327 U. S. 280 4
Continental Motors v. Twp. of Muskegon, 77 N. W. 2d 370 9
Esso Standard Oil v. Evans, 345 U. S. 495 2
Green Bay & Miss. Canal Co. v. Pattern Paper Co., 173 U. S. 179 2
James v. Dravo Contracting Co., 302 U. S. 134 4
M'Culloch v. Maryland, 4 Wheat. 316 6
Mich. Trust Co. v. City of Grand Rapids, 247 N. W. 744 11
People v. Sears, 176 N. E. 273 11
United States v. Allegheny County, 322 U. S. 174 . . 7
United States and Borg-Warner Corp. v. City of Detroit, 355 U. S. 466 2
United States v. Muskegon Twp., 355 U. S. 484 . . . 2, 3
United States v. Sarkozy, 99 F. Supp. 736 5

Michigan Statutes and Opinions of Michigan Attorney General:

Michigan General Property Tax Law, Act 206 P. A. 1893, as amended:
  Sec. 7 (211.7 C. L. Mich. 1948) 8
  Sec. 9 (211.9 C. L. Mich. 1948) 8
  Sec. 154 (211.154 C. L. 1948) 10

Op. Attorney General, July 20, 1936, p. 3, 1937-8 . . 11
Op. Attorney General, Aug. 22, 1939, p. 193, 1939-40 8
Op. Attorney General, Aug 12, 1941, p. 285, 1941-2 8
Op. Attorney General, Nov. 7, 1941, p 405, 1941-2 8

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REPLY TO PETITIONS FOR REHEARING OF GOVERNMENT AND APPELLEE

◆

INTRODUCTION

(This response to Government's Petition for Rehearing is also made to Petition of Appellee, Murray. We have chosen to follow the form of the Government's presentation and limited our reply to its contentions involving Michigan law. This, for the reason that discussion of application of Michigan tax laws under other circumstances or in interpretation of other constitutional provisions is not pertinent or relevant within the scope and intent of

this Court's opinion. Any distinction, as urged by appellee, between ad valorem property taxes and specific taxes under Michigan laws is not controlling of the constitutional immunity issue in this case.)

The reasons set forth in the petitions for rehearing are based upon misapprehension of the scope and meaning of the decision of this Court. (See *Green Bay & M. Canal Co. v. Patten Paper Co.*, 173 U. S. 179, 189.)

The Government and appellee assume that the Court was determining something beyond the question of validity, so far as constitutional immunity was concerned, of the tax laws of Michigan and the Charter of Detroit as here applied.

The Court did not change the tax laws of Michigan as the Government and appellee infer. The Court interpreted them, as fully submitted by briefs and arguments, solely in their relation to the Constitution of the United States. It merely found that in their operation and effect as here applied, so far as constitutional immunity is concerned, there was no essential difference between them and the law the Court had just upheld in *United States and Borg-Warner Corp. v. City of Detroit* 355 U. S. 466, and *United States v. Muskegon Township* 355 U. S. 484, (Nos. 26 and 37) and very similar in this respect to the taxes upheld in *Esso Standard Oil v. Evans*, 345 U. S. 495.

For the government to lift one sentence from the Court's opinion as it did (p. 7) and conclude from that that this Court had determined privilege and property taxes are identical under all circumstances is, we believe, contrary to the Court's intent as gathered from the entire opinion and particularly the sentence immediately following the one noted.

The Court was careful to point out several times that it was considering these laws and their application only so far as constitutional immunity was concerned and that the important or controlling consideration in that respect should not be the name of the taxes, but their application and practical operation and effect.

The Court will recall also that the Government itself suggested that conceptually a so-called tax on property is virtually indistinguishable from a tax on the privilege of holding property (Gov.'s Brief in Borg-Warner, p. 22; see also our Reply Brief herein, pp. 31-2).

As the Court said (see p. 493 of 355 U. S.; p. 44, of 2 L. Ed. 2d:

> "However, *in passing on the constitutionality* of a state tax, 'we are concerned with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' "
>
> * * * * *
>
> "Consequently *in determining whether these taxes violate the Government's constitutional immunity* we must look through form and behind labels to substance."
>
> * * * * *
>
> "As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances. Cf. *Detroit Shipbuilding Co. v. Detroit*, 228 Mich. 145, 199 N .W. 645; *Detroit v. Gray*, 314 Mich. 516, 22 N. W. 2d 771." (Emphasis supplied.)

This, as expressed by the Court, is the substance of appellants' argument throughout this case and the basis for our contention that, so considered, the decisions of this Court in *Esso, supra, Dravo (James v. Dravo Contracting Co.,* 302 U. S. 134) and *King-Boozer* (*Alabama v. King and Boozer,* 314 U. S. 1) etc., the so-called privilege tax cases were pertinent and applicable.

> (Jurisdictional Statement, pp. 15 & 16; Appellants' Brief, page 26, first paragraph; page 27, last paragraph; Appellants' Reply Brief, page 27, paragraphs 3-6, Appendix pp. 1a-17a.)

Under other circumstances when other constitutional or legal questions are before the Court, these laws might have a different operation and effect as, for instance, under the uniformity clause of Michigan's Constitution.

For purposes of state law these might be *ad valorem* personal property taxes as distinguished from privilege taxes. However this Court is not governed by how Michigan law treats them insofar as the constitutional immunity of the Government is concerned, if in their operation and effect they are applied in a similar or identical fashion and have the same effect under that doctrine as privilege taxes previously upheld by this Court.

In *Commissioner of Int. Rev. v. Tower,* 327 U. S. 280, 287, this Court said:

> "Respondent contends that the partnership arrangement here in question would have been valid under Michigan law and argues that the Tax Court should consequently have held it valid for tax purposes also. But the Tax Court in making a final authoritative finding on the question whether this was a real partnership is not governed by how Michigan law might treat the same circumstances for purposes of State law.'

(See, also, *United States v. Sarkozy*, 99 Fed. Supp. 736)

Here, Murray, a private corporation was taxed and was subjected to and personally responsible for payment of the taxes, as provided in and permitted by the laws and decisions of Michigan. The Government and its interests were fully protected. The fundamental principle of immunity, which is the protection and preservation of the Government's supremacy, still remains.[1]

We submit that the Court decided this case on correct principles of constitutional law. The Court had the benefit of extensive briefing on this question (See Appendix for references and excerpts) and oral argument at which the Court's awareness of and interest in the constitutional phase of the case were well demonstrated by the numerous questions directed to counsel. If the Government and appellee now claim surprise, it must be at the result and not the means by which the Court arrived at its conclusion or the ample consideration it gave to this question.

If the Court chose in this case to call upon its own wealth of knowledge of this constitutional question to supplement the arguments of counsel, who can or should complain?

Now the Government would have the Court "modify" its opinion. It seeks, however, not modification but reversal. To limit approval of these taxes to a future change in wording of the law would be to nullify the opinion and void the taxes here and in other pending cases involved. The heart and substance of the opinion in this case is its restatement of the fundamental principle of implied constitutional immunity, namely, that whatsoever be its name, a non-discriminatory tax, if imposed directly on a private person with no interference with the Government or its operations, is constitutional. Conversely, it would be unconstitutional.

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[1] It is worth noting that neither of the petitions for rehearing suggest that this Court's decision will affect the United States (aside from the cost and possible inconvenience in adjusting contracting procedures to it). Neither added cost nor inconvience is cause for rehearing or reversal. Neither is the Government's concern over possible retroactive taxation warranted. No absolute unlimited right exists to levy property taxes retroactively unless permitted and conforming to statutory authorization.

M'Culloch v. Maryland, 4 Wheat. 316.

I.

CONTROLLING ISSUES DECIDED BY THIS COURT WERE LITIGATED HERE AND BELOW

The Government and appellee assert in effect that the determination of the Court of similarity between an *ad valorem* personal property tax and a privilege tax on the use or possession of property is not the result of briefs and argument in any court.[2] The Government now contends (Pet. p. 5) that the litigated question was confined to the issue of ownership of the materials. It infers and is echoed by appellee (Pet. p. 2) that there was no constitutional question submitted beyond determination of such ownership. This has already been countered in the Introduction (*supra*, p. 3).

Such factual and legal differences as may exist between these taxes and so-called privilege taxes, beyond the question of constitutional immunity, are irrelevant so far as such question is concerned.

The Government's and appellee's contention that they had no occasion to call attention to these differences is refuted, however, by the record of what was submitted below and to this Court, under appellants' third question, in briefs and pleadings, highlights of which we refer to in an appendix attached hereto.

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[2] It is notable that the vital phrase "as far as constitutional tax immunity is concerned" is omitted from their discussions.

II.

PROPERTY TAXES INVOLVED WERE IN THEIR OPERATION AND EFFECT AND AS APPLIED, SO FAR AS CONSTITUTIONAL IMMUNITY OF THE GOVERNMENT IS CONCERNED, NO DIFFERENT THAN PRIVILEGE TAXES

The second section of the Government's Petition for Rehearing (p. 7) lifts out of context the Court's connection of the taxes in question with those upheld in Borg-Warner, etc. (26 and 37) on persons using exempt real property. It overlooks that the opinion was concerned solely with operation and effect of said taxes on the United States as here applied.

Suggestion is then made that no person in possession of concededly tax-exempt property was taxed under the laws of Michigan as construed by Detroit at the time of the assessments involved. Support is claimed by referring to the fact that tools owned by the United States in Murray's possession were not included in the assessment.

The City's position with regard to such tools owned by the United States was in deference to the particular facts in Allegheny (*United States v. Allegheny County*, 322 U. S. 174). This apparently placed the Government's own tools in a twilight zone of immunity which rightly or wrongly the assessors did not challenge.[3] However in the case of the materials acquired by the taxpayer and in its possession on tax day, title to which was transferred to the United States, Michigan law clearly permitted the assessments made against Murray.[4] Provisions of the

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[3] The Court's opinion may possibly be broad enough to include such tools. However omission thereof from original assessment does not warrant a rehearing on that ground.

[4] Contrary to the Government's contention, property of State agencies and other tax exempt institutions loses that exemption when not used by them and when placed in private hands for a use which is not public, charitable, benevolent, etc.

General Property Tax Act of Michigan having to do with exemptions (Secs. 7 and 9 of Act 206 P. A. 1893, as amended, 211.7 and 211.9 C. L. Mich. 1948) indicate and have been construed, in the case of governmental units, that to be entitled to immunity from taxation the property must be public (in its use) and, in the case of charitable, etc. institutions, must be occupied by them solely for the purposes for which they were incorporated.[5]

Application of these tax laws to the advantage of the Government in this instance is no criterion for their construction by this Court differently than as indicated by the citations and opinions noted. This Court's decision is an interpretation of the Constitution based on the facts herein. If disposition of the constitutional question resolves situations other than those involved that is a usual consequence of such determinations. It is not cause for re-hearing or reversal but may be matter for another day.

III.

THE HOLDINGS ARE NOT CONTRARY TO THE STATE LAWS OF MICHIGAN

Similarly in the third section of Government's Petition (p. 8) it has misinterpreted the opinion of this Court claiming it as a holding that the taxes in question are the equivalent of privilege taxes for all purposes. This, despite the careful reservation announced in no less than seven instances in the majority opinion that its determination upholding the taxing statute in Murray was a finding of validity under the constitutional tax immunity doctrine.

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[5] Authorization for assessment of leasehold interest in real estate owned by the State of Michigan and a cottage built by the lessee on such leased propery as the personal property of such lessee and cottage owner was indicated by Opinion 20807, Aug. 12, 1941 in Opinions of Attorney General of Michigan, 1941-2, at p. 285.

Authorization for taxation of land of a cemetery association not used exclusively for burial grounds was indicated by Opinion 21753, Nov. 7, 1941, *Ibid*, p. 405.

Authorization for taxation of houses owned by a college and rented to professors was indicated by Opinion dated Aug. 22, 1939 in Opinions of Attorney General of Michigan, 1939-40 at p. 193 *et seq.*

Support therefor came from a number of Michigan cases including *Auditor General v. Women's Temperance Association*, 78 N. W. 466.

Contrary to the contention made that the Court has construed this statute contrary to the law of this State, R. F. C. property could be assessed to an occupant in possession and is not exempt under Michigan's General Property Tax Laws.

> See, *Continental Motors v. Twp. of Muskegon*, 77 N. W. (2nd) 370, 346 Mich. 141.

The reply of City of Kenosha (343) conclusively answers the Government's contentions relative to application generally of the law of Wisconsin. Answer to further claim that under Michigan statutes taxes are not collected from other persons who use tax exempt property is more fully presented *supra* pp. 8-9.

IV.

AS UPHELD BY THIS COURT, THESE TAX STATUTES DO NOT DISCRIMINATE AGAINST FEDERAL PROPERTY

The thrust of the Government's contention (Pet. p. 11) that the statute under consideration discriminates against federal property is unfounded.

The bald assertion (p. 12) that no showing can be made that Michigan has assessed its personal property tax against persons in possession of State-owned or charity-owned tax exempt property is barren of documented authority. Nor could it be supported—it is contrary to law and fact.

V.

SPECULATIONS AS TO INCONVENIENCE OR ADDED COST, IF ANY, TO GOVERNMENT OR PRIVATE PARTIES, ARE NOT GROUNDS FOR REHEARING OR REVERSAL

Since the economic effect of the decision was not deemed material in the first instance, the exaggerated claims and conjectures of the Government as to costs (Pet. p. 13) have no place in its Petition.[6]

The mere fact that private or Governmental activities must be adjusted to decisions of this Court is no ground for rehearing or reversal. A contrary opinion would likewise require adjustment by the several States.

We come to the charge of the burdensome impact of possible retroactive taxation of private contractors who in prior years used government-owned property in connection with a business conducted for profit. This again is unsupported by authority. It is likely that the view expressed is made in the light of federal statutes dealing with internal revenue taxation.

This is no more of an issue than the economic impact of current taxes. However, even if it were, it is clearly not supported by State laws of Michigan or its neighboring States.

Where assessments are sought to be placed on a current roll for property omitted in a previous year, same must conform with Sec. 154 of General Property Tax Law of 1893, as amended, being Sec. 211.154 C. L. Mich. 1948, which contains this proviso:

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[6] Much of the listed estimates involve real property for which lessees or users may be assessed under the decision of Borg-Warner (No. 18) of which decision the Government is not now complaining.

> “‘* * * And provided further, That in case of change in ownership of the property omitted, said taxes shall not be spread against said property prior to the last change of ownership.’”[7]

(For full text, See Appendix p. 18a.)

That this proviso applies to personal property has been settled by *Michigan Trust Co. v. City of Grand Rapids,* 247 N. W. 744. Cited therein to the same effect is *People v. Sears,* 176 N. E. 273, 344 Ill. 189.

In administrative practice, the Michigan State Tax Commission has declined to authorize omitted assessments in the case of personal property against persons listed on previous rolls. It has regarded same as an attempt to obtain a belated correction rather than a correct application of the omitted property provision. Further, it has indicated that the transitory nature of personal property resulting in change in possession, form, or character requires stricter construction than in the case of real estate. Finally, as interpreted, no retroactive assessment could be sought based on a mistake of law.

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[7] For construction of Section 154, see Opinion dated July 20, 1936, Attorney General of Michigan, 1937-38, at p. 3 *et seq.* Cited therein is the following:

> “The liability of the owner of property for the payment of taxes is purely statutory. The law is well stated that the legislative power of a state to provide the levy and collection of taxes is unlimited, except as restricted by the state and federal constitutions. The obligation of the citizen to pay taxes is purely a statutory creation, and taxes can be levied, assessed and collected only in the mode pointed out by express statute. (*Cooley on Taxation* (2nd Ed.), p. 15.)”

VI.

TO MODIFY THE DECISION IN MURRAY IN THE MANNER SUGGESTED WOULD NULLIFY THE BASIC CONSTITUTIONAL PRINCIPLE UPON WHICH IT RESTS

The suggestion in the closing section of its petition of need for rehearing or modification in Murray and American Motors is based on speculation as to steps which might or might not be taken by the respective legislatures. This litigation was not brought to obtain a declaratory judgment to cover a large number of factual situations. It deals with a particular tax statute, application of which under the present circumstances has been held valid when examined in the light of constitutional immunity from taxation.

The decision is more specific in its scope than the Government and Murray have been willing to recognize. There is no ground for modification or much less for reversal. The immunity principle has been re-examined and correctly applied by this Court.

CONCLUSION

Wherefore, it is respectfully prayed that the petitions be denied.

Respectfully submitted.

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May 12, 1958.

APPELLANTS' APPENDIX

EXCERPTS FROM APPELLANTS' JURISDICTIONAL STATEMENT

* * * * *

(P. 6)

3. If inclusion of such partial payment-title passage provisions was authorized by Federal statutes and vested absolute and not paper or security title to such materials in the Federal Government,—then were state and local statutes and non-discriminatory *ad valorem* taxes levied thereunder (the incidence of which was not against the government and for which appellee alone is liable for payment and collection) nevertheless valid as imposing no direct burden upon the Federal government in violation of its implied constitutional immunity?

* * * * *

(Pp. 14-15-16)

4. REAPPRAISAL URGED OF CONSTITUTIONAL IMMUNITY DOCTRINE

The mere finding that this is an *ad valorem* property tax on personal property of the government in the hands of a private party is not just cause for nullifying it, as the Court below did on the authority of *United States v. Allegheny County,* 322 U. S. 174.

We urge upon the Court the desirability—perhaps the necessity—of now reappraising its decision in *Allegheny, supra,* if it may not be distinguished—with such help as counsel herein are able to provide in briefs on the merits and in oral argument, to determine whether it is in conflict with and unsustainable under the theory of "incidence" or "direct burden" of a tax under the constitutional immunity doctrine as firmly established by such decisions as: *James v. Dravo*, 302 U. S. 134, 114 A. L. R. 318; *Helvering v. Mountain Producers*, 303 U. S. 376; *Graves v. New York*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *Esso Standard Oil Co. v. Evans*, 345 U. S. 495; *New Brunswick v. United States*, *supra*, and *S. R. A. v. Minnesota*, *supra*, and others.

Under the facts and circumstances presented by this appeal these decisions of this Court wherein the true principle of 'incidence of the tax' has been enunciated are, we maintain, pertinent.

We respectfully suggest that the entire subject of constitutional immunity can be clarified and rendered possible for future consistent use by this and inferior courts by proper application of the rule laid down by Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 579 at p. 609, to any and all types of taxes (*ad valorem* as well as specific) namely:

If the tax "*retards, impedes, burdens, or in any manner controls the operations of * * * the powers vested * * * in the general government*" then it is bad. If not it is good.

In this spirit it was suggested to the Supreme Court in the *Dravo* case, *supra*, that it restrict the rule of tax exemption so that a private person who sells to or contracts with the Government cannot claim the immunity against taxation which properly belongs to the sovereign alone (See *Amicus Curiae*—Brief of the Solicitor General and Attorney General, pp. 2-3, *James v. Dravo*, *supra.*) It is our contention that to uphold such restriction here would fit within Chief Justice Marshall's rule or theory of the doctrine of implied constitutional immunity and logically validate the tax laws and taxes here involved.*

* * * * *

(P. 15)

It is our contention, which we would like to develop more fully in briefs and argument at the earliest opportunity convenient to the Court, that these non-discrimatory taxes here involved, assessed against a private corporation for the payment of which such corporation is solely responsible, and which place no burden upon the government, except such as the government may have assumed by its contracts with the taxpayer (appellee), are and should be equally as valid as the taxes involved in *Dravo, King & Boozer, New Brunswick, S. R. A. etc., supra.*

* * * * *

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*Chief Justice Marshall was attempting to resolve a conflict between the Federal Government and a State, involving the whole philosophy of State v. Federal power. Before him was the studied and deliberate attempt by a State to destroy a Federal instrumentality by the levy of a discriminatory "political" tax leveled exclusively at the branch of the United States bank established in Maryland. (Argument of Pinckney in M'Culloch, 4 Wheat. p. 598.)

It is noteworthy that the Chief Justice was careful to except from the effect of his opinion in M'Culloch non-discriminatory taxes (property taxes included) 4 Wheat. 609. We contend and would like the opportunity to present our views that a true interpretation of that opinion with such exception must logically, legally and equitably lead to the inevitable conclusion that the tax laws and taxes now before this Court should be validated.

EXCERPTS FROM MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM

(Pp. 6-7)

* * * * *

3. The third question, namely, whether the *ad valorem* property tax on the property of the United States is constitutionally valid because the tax was assessed to the contractor and not directly to the United States, is completely answered by *United States v. Allegheny County,* 322 U. S. 174, and *Kern-Limerick, Inc. v. Scurlock,* 347 U. S. 110. Property which belongs to the Federal Government is not subject to local property taxation merely because the property is in the possession of another or merely because the tax is to be paid by a private party.

* * * * *

EXCERPTS FROM APPELLANTS' BRIEF

(P. 25)

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The facts and law in this case are in harmony with correct principles of the implied governmental immunity doctrine as established by this Court and these taxes are valid thereunder. Said taxes are not taxation of the means employed by the Federal Government for the execution of its powers nor do they retard, impede, burden (except possibly economically) or in any manner control the operations—of the general government for the reason that the incidence of these taxes is not against the Government, its instrumentalities or its property and, therefore, they constitute no direct burden against the United States under this Court's decisions.

The tax laws involved, as they are here administered and interpreted, fix the liability and responsibility for the payment of these taxes and make them a charge against appellee personally. They may be collected from appellee both by suit against the corporation for collection of debt and by seizure of the corporation's property other than the property here claimed to be owned by the United States. These tax laws, so interpreted by the Michigan Supreme Court, determine the incidence of the tax against the person named on the assessment roll, appellee herein, there being no question as to the identity of the taxpayer (Murray) under the terms of these contracts, and those findings are conclusive upon this Court.

Whatever interest the Government has in the materials used by appellee in the performance of its subcontract to a Government prime contractor is protected by subjecting the assessment to prior rights of the Government and by decisions of this Court holding that neither the Government nor its property may be subjected to any action or proceedings for collection of the tax.

(P. 26)

There can be no distinction between *ad valorem* property taxes of this character and privelege, excise or other taxes under the immunity doctrine when an independent contractor bears the full impact of the taxes equally in each case and the Government and its property is equally free from destruction or interference in each instance. The substance and effect of the tax, not its name, is controlling in the determination of this Court as to whether it is a tax upon the means of government operations or any attempt to impede, retard, burden or control Government operations.

• • • • •

(P. 27)

Inasmuch as there is no direct burden laid upon the Government and there is only a remote (economic), if any, influence upon the exercise of functions of Government in the imposition of these taxes; and, there is no attempt to destroy, hamper or control the Government or its contractors in carrying out these contracts, there is no discrimination against or interference with the Government's operations, these taxes should be held valid under principles of implied immunity heretofore proclaimed by this Court.

* * * * *

(P. 77)

III.

ARE THESE STATE AND LOCAL LAWS AND NON-DISCRIMINATORY TAXES LEVIED THEREUNDER VALID NEVERTHELESS AS IMPOSING NO DIRECT BURDEN ON THE FEDERAL GOVERNMENT IN VIOLATION OF ITS IMPLIED CONSTITUTIONAL IMMUNITY?

* * * * *

(Pp. 85-86-87)

Both the *Thomson* and *Peniston* statements of the basic principles of immunity and its limitations, as above quoted, and as reasserted in *Willcuts v. Bunn*, 282 U. S. 216, and *Metcalf v. Mitchell*, 269 U. S. 523, were used by Chief Justice Hughes in *James v. Dravo*, 302 U. S. 134 (followed since by such cases as *Esso Standard Oil v. Evans*, 345 U. S. 495; *Graves v. New York*, 306 U. S. 466; *Helvering v. Mountain Producers*, 303 U. S. 376; *Alabama v. King & Boozer*, 314 U. S. 1; *Oklahoma Tax Com. v. Texas Co.*, 336 U. S. 342; *S. R. A. v. Minnesota*, 327 U. S. 558; *Smith v.*

Davis, 323 U. S. 111, among others) as the basis for the Court's adoption of the modern version of the rule that if the direct burden or incidence of the tax is not on the Government and the taxation does not in any substantial way interfere with the performance of federal functions but the effect is only remote, then it should be valid.

* * * * *

(P. 87)

Since 1937, when *Dravo* was decided, this Court has maintained an interpretation and application of the immunity principle in conformity with ***M'Cullcch, Thomson*** and ***Peniston*** validating taxes not directly imposed on the Government functions and in doing so has regarded the substance and direct effect of the tax, not the form, type or label as determinative of its incidence.

* * * * * *

(P. 96)

PROCEDURE FOR ASSESSMENT AND LEVY OF PERSONAL PROPERTY TAX UNDER CHARTER, ETC.

The substance of the procedure under the *Charter* and *State Law* in the levy of a personal property tax is to lay (levy) a tax on the owner or person in possession (the taxpayer named on the roll, in this instance, the appellee) of personal property. (Sec. 7, Ch. II, Title VI, Charter above.) This contrasts with procedure for levy of an ad valorem real property tax condemned in *United States v. Allegheny*, 322 U. S. 174, as laying a tax on Government property.

* * * * *

(P. 111)

REAL INTERESTS SHOULD BE DETERMINED REGARDLESS OF LABELS

Labeling this tax as a personal property tax or the Government as title holder of the property should not foreclose this Court from ascertaining the true nature of the tax and of the Government's interests in the property.

EXCERPTS FROM BRIEF FOR THE UNITED STATES

(P. 13)

* * * * *

3. The property on which the *ad valorem* property taxes were here assessed, being property of the United States, is immune from taxation by appellants. Such property is not subject to local property taxation merely because the property is in the possession of another, or merely because the tax is to be paid by a private party. *United States v Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc. v Scurlock*, 347 U. S. 110. Neither form nor nomenclature o a tax is controlling over substance. If the tax is in substance a tax on the property of the Federal Government the tax must fail.

* * * * *

(P. 43)

III.

PROPERTY OF THE UNITED STATES IS IMMUNE FROM LOCAL TAXATION

The basic doctrine of implied immunity of property of the United States from local taxation* is, of course, well settled by the Court's decisions. *United States v. Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. The instrumentalities and property of the United States are immune from state taxation or regulation, unless Congress affirmatively provides otherwise (which it has not done here). *Mayo v. United States*, 319 U. S. 441, 448.

This immunity does not, as appellants seem to urge (Br. 106, 116, 127-128), come into being only upon a finding that an assessed tax, in fact, constitutes a real interference with the operations of the Federal Government or poses an actual threat to its continued existence. The interest of the United States in its own property is, without more, immune from local taxation, and the tax is not saved from invalidity because the local taxing unit has adopted procedures to assess against, and collect from, those in whose possession the property may be found. A tax may not be imposed upon private persons (here the Murray Corporation) to accomplish the collection of a tax against the United States which could not otherwise be levied.

* * * * *

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*The legal issues presented under this point are similar to those discussed by the Government in detail in its brief in *United States of America and Borg Warner Corporation (Detroit Gear Division) v. City of Detroit, a municipal corporation*, No. 26, this Term, to which we respectfully refer the Court.

(P. 45)

Those cases which, despite the claim of implied Governmental immunity, have allowed local taxation of those with whom the Federal Government chooses to deal (*James v. Dravo Contracting Co.*, 302 U. S. 134; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466; *Alabama v. King & Boozer*, 314 U. S. 1; *S. R. A., Inc. v. Minnesota*, 327 U. S. 558; *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342; *Esso Standard Oil Co. v. Evans, supra*) rest upon the conclusion that the tax in question was one based upon the private person's individual gain or advantage, whether obtained by way of receipts, profits, privilege or ownership.

* * * * *

(P. 46)

Therefore the only question open to appellants is whether the Government owned the property upon which the *ad valorem* personal property tax was assessed or levied. As we have already shown, this question must be decided against the appellants.

* * * * *

EXCERPTS FROM BRIEF OF APPELLEE AND RESPONDENT

* * * * *

(P. 6)

4. Is property owned by the United States (otherwise immune from local taxation) subject to state and local *ad valorem* personal property taxation merely because the property is in possession of a private contractor and the tax is billed to the contractor and not directly to the United States?

* * * * *

P. 90)

IV.

WAS THE PROPERTY OF THE UNITED STATES, IN POSSESSION OF MURRAY, IMMUNE FROM PERSONAL PROPERTY TAXES ASSESSED BY APPELLANTS?

* * * * *

(c) personal property of the United States is immune
rom ad valorem property taxation by a state or subdivi-
ion thereof, whether or not such property is in the pos-
ession of the United States, or a bailee, even though such
ax is assessed to such bailee, and not to the United States.
nited States v. Allegheny County, 322 U. S. 174 (1944);
ee *Kern-Limerick, Inc.* and *United States v. Arkansas,*
47 U. S. 110 at 123, footnote 14; compare, *Esso Standard
il Co. v. Evans,* 345 U. S. 495, at 499 and under Michigan
uthorities as well, *Taylor v. County of Genesee,* 286
ich. 674, 677-8; *National Bank of Detroit v. City of De-
roit,* 272 Mich. 610; *Opinions of Mich. Attorney General,*
an. 17, 1936 and May 28, 1941.

P. 91)

These propositions are basic and controlling.

Appellants seek to avoid the impact of the controlling
octrine of the *Allegheny* case by contending that—(a) (i)
n the *Allegheny* case the Court held that

> " 'This form of taxation is not regarded as a form of personal taxation, but rather as a tax against the property as a thing.' (p. 1218, 88 L. Ed.);"

whereas

> (ii) "* * * our personal property tax is regarded as a form of personal taxation rather than as a tax against the property * * *."

(Appellants' Brief, page 121; also *96-107*);

(b) because the City of Detroit personal property taxes are payable by the owners or person in possession—

> "The direct burden or incidence of these taxes is, therefore, upon and against the independent contractor, appellee." (Appellants' Brief, p. 106.)

(c) therefore, the doctrine of constitutional immunity does not apply, citing and relying upon cases—which deal entirely with state privilege or excise taxes, except as noted hereinafter—where the incidence of the privilege or excise tax is directly upon a contractor even though such contractor may ultimately pass the economic burden on to the United States government.

Fifty-two pages of Appellants' Brief are directed to this argument (pages 77-129).

This entire argument is predicated upon the erroneous and fallacious contention of Appellants that the personal property assessment and taxes here involved are not upon the property, but upon the "owners or persons in possession."

* * * * *

(Pp. 101-102)

The "direct burden or incidence rule" relied upon by appellants applies primarily to privilege or excise tax cases, which are here inapposite. Appellants in support of their contention that the incidence of the personal property tax in the instant case is upon Murray and not upon the Federal government cite and rely upon *Esso Standard Oil Company v. Evans,* 345 U. S. 495; *James v. Dravo,* 302 U. S. 134; *Alabama v. King & Boozer,* 314 U. S. 1; *Graves v. New York,* 306 U. S. 466; *Helvering v. Mountain Products Corporation,* 303 U. S. 376; *Oklahoma Tax Comm. v. Texas Co.,* 336 U. S. 342 (Appellants' Brief, pages 85, 87).

It is significant indeed that each of these cases involved excise or privilege taxes, for a privilege exercised by the contractor, where the incidence of such privilege tax was upon the contractor, although the economic burden was subsequently passed by such contractor to the Government. These privilege taxes are basically different in character and must be distinguished from an ad valorem property tax upon the property—title to which is vested in the United States—where the incidence is directly and solely upon the property assessed.

* * * * *

EXCERPTS FROM APPELLANTS' REPLY BRIEF

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(P. 26)

V.

THESE NON-DISCRIMINATORY TAXES ARE VALID AS IMPOSING NO DIRECT BURDEN ON THE FEDERAL GOVERNMENT IN VIOLATION OF ITS IMPLIED CONSTITUTIONAL IMMUNITY.

(In reply to Government's Question III and Appellee's Question IV)

* * * * *

(P. 27)

If the preservation and protection of the Government from hostile State action is the true concern of this Court under this doctrine and not the preservation and protection of private individuals or corporations, then it is incumbent on the Court to determine in each case if the particular tax involved (whether property, privilege, specific, excise or whatever) is actually or potentially destructive to any governmental powers or functions.

The Court in applying this test is not, then, concerned with the name or form of type of tax but is concerned with its substance and effect on the Government (Our Br. 111).

* * * * *

(Pp. 28-29)

The facts in this case, i. e., that the tax is levied upon and charged to a private corporation which is the taxpayer, that the tax cannot be collected from the Government or its property and that the direct burden or incidence is, therefore, upon such private corporation and not upon a means of Government operation, nor, is it an interference with any Government function, are, to the Government and appellee, irrelevant.

Their argument discards all of the decisions of this Court where factual situations showing or failing to show interference with Government operations, were controlling, such as *M'Culloch v. Maryland, supra; Thomson v. Union Pac. R. R.* 76 U. S. 792; *Union Pac. R. R. v. Peniston, supra; James v. Dravo Contracting Co., supra; Graves v. New York,* 306 U. S. 466; *Oklahoma Tax Com. v. Texas Co.,* 336 U. S. 342; *Alabama v. King & Boozer,* 314 U. S. 1; *Curry v. United States,* 314 U. S. 14; *Esso Standard Oil Co. v. Evans,* 345 U. S. 495; *S. R. A. Inc. v. Minnesota, supra; New Brunswick v. United States, Supra; Land O'Lakes v. Wadena County,* 229 Minn. 103, affirmed by this Court 338 U. S. 897, citing 327 U. S. 558, and others.

The facts in the above cases having shown the direct burden or incidence of the taxes involved to be upon private persons, and, there being no interference with Government operations, those taxes were validated (except for *M'Culloch*, the facts in which having demonstrated an interference with Government operations, the tax was held invalid).

* * * * *

(P. 31)

SUBSTANCE, NOT FORM OR NAME, OF TAX CONTROLS

The Government (Br. 44) urges the Court to look to substance rather than nomenclature and form to determine the *nature* and *effect* of this levy (although our opponents' arguments belie it). We first suggested this approach (Br. 111-115).

If substance be "that which underlies outward manifestations" *(Webster)* then the levy of this tax and its charge to Murray, under the Charter and by the assessment roll (Br. 94-106), plus the fact that both under the law and decisions the tax can be collected by suit against Murray or levy upon its property (Our Br. id.) and that no enforcement can be or was made against the Government or its property (Our Br. 107-110) is the substance of this taxation. The name given to it or its measurement by valuing property are, so far as nature and effect, merely name and form.

However, assuming for argument, that this is a property tax because it is *ad valorem,* i. e., according to the value of property, is there any reason why the opinions of this Court in so-called privilege tax cases, such as *Dravo etc., supra,* should not be considered in the determination of this matter? We think they should.

The Government itself so suggests when it says:

> "Conceivably one might denominate any ordinary 'property' tax as a 'privilege tax'. A property interest is ordinarily regarded as an aggregation of rights and privileges possessed by the owner. So viewed, a so-called tax on property is virtually indistinguishable, as a conceptual matter, from a tax on the privilege of holding the property." (P. 22 Brief of Government in U. S. A. and *Borg-Warner v. City of Detroit*, No. 26, Supreme Court of United States, set for hearing with this case; *U. S. v. City of Detroit*, 345 Mich. 601.)*

Accepting the Government's concept above, if a tax on the privilege of holding property *(Esso)* is "virtually indistinguishable" from a tax on property *(Allegheny)*, then, if the direct burden and incidence of a property tax is upon a private person and there is no interference with Government operations or functions *(Dravo)*, why shouldn't the latter tax be equally valid? The fact that Government property is being used in both to measure the amount of tax the private person is required to pay changes nothing. Both are non-discriminatory and neither interferes with any Government operations.

Our contention (passing the questions of authority, Q. I, and ownership v. paper title, Q. II), is that the underlying principles of implied immunity as well as its limitations as laid down by *M'Culloch* and interpreted and reasserted in *Thomson; Peniston; Dravo; Graves v. New York; King-Boozer; Esso; S.R.A., supra*, etc., admit of no distinction between types of taxes, if the taxes impose no direct burden on the Government, are non-discriminatory and constitute no impediment to Government functions.

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*See reference by Government in its Brief in this case to Borg-Warner Brief (Footnote p. 43).

The mere fact that the situs of property determines the tax jurisdiction (in certain instances) (Appellee''s Br. 95) s not determinative of the character of the assessment as personal or *in rem*.

• • • • •

If the Court is inclined to examine the matter further, we offer to furnish excerpts of the following references to other portions of pleadings and briefs in support of appellants' position. (*Supra* p. 6, Sec. I of Reply):

IN THIS COURT

Petition for Writ of Certiorari, November 10, 1956, Pp. 4, 12-15.

Brief for Respondent (Murray) in Opposition Pp. 12-13.

Brief for United States in Opposition Question 5 on p. 2, Subdivision 2C on pp. 9-10.

IN THE COURT OF APPEALS

Brief of Appellant City Pp. 30-61.

Reply Brief of Appellant City Pp. 13-19.

Brief of Murray Corporation, Appellee Pp. 65-74.

Brief for the United States Pp. 16-20.

IN THE DISTRICT COURT

Brief of City of Detroit Pp. 42-49.

eply Brief of Murray Corporation Pp. 36-40

rief and Appendix of United States Pp. 11-12.

omplaint (Joint Appendix p. 6 Paragraphs 7, 8, 9)

MICHIGAN OMITTED PROPERTY STATUTE

211.154 Property omitted from tax roll; procedure to assess. Compiled Laws, Mich. 1948

"Sec. 154. If it shall be made to appear to said board at any time that any property liable to taxation has not been assessed for any previous year as herein provided, the said board shall report the same to the proper assessing officer and the same shall be listed for taxation upon the next assessment roll that shall be made, and shall be valued as all other property. The said board shall further certify to the board of supervisors of the several counties at the October session thereof, next after said property shall be then listed for taxation, the description of said property and the several years that the same has been liable for and escaped taxation, and said board of supervisors shall ascertain the rate of taxation, for said several years and shall order the taxes for said years to be spread against said property upon the valuation for the then current year, and the same shall be so spread in a column provided for that purpose, and it shall constitute a charge against the person and property, and be collected as other taxes: Provided further, That this provision shall not be deemed to relate back prior to the going into effect of this section: And provided further, That in case of change in ownership of the property omitted, said taxes shall not be spread against said property prior to the last change of ownership. This section shall not apply to any land upon which taxes have been assessed and rejected for any of the reasons specified in this act. Such rejected taxes shall be reassessed as provided in this act regardless of any change of ownership."

20

Nos.

18

36

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
MAY 14 1958
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

Nos. 18 and 36

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,
vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Appellee, and
THE UNITED STATES OF AMERICA, Intervenor

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*ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT*

Rejoinder of Appellee to Reply of Appellants on Petition for Rehearing

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The Murray Corporation of America

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

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Appellants in their Reply to Appellee's Petition for Rehearing—because of the obvious futility of attempting so to do—do not assert that under the Michigan Constitution and Michigan decisions (cited in our Petition for Rehearing) that the tax in question is not an ad valorem property tax—and is a specific or privilege tax. Nor do Appellants assert that under the Michigan Constitution and decisions, interpreting these constitutional provisions, the distinction between this ad valorem tax and privilege taxes (such as Act 189 involved in the Borg-Warner case) is not fundamental and basic.

Nor do Appellants explain why in the Borg-Warner and Continental cases, Counsel for the City of Detroit and for Muskegon each were so careful to point out the basic differences between the ad valorem tax in Murray and the privilege tax (Act 189) in those cases (See our Petition for rehearing pp. 8-9), that:

> "License taxes, privilege taxes and occupation taxes are specific taxes and not ad valorem taxes upon property. *C. F. Smith v. Fitzgerald*, supra [270 Mich. 659, 673]. . . .
>
> **"Property taxes are regarded as a tax 'against the property as a thing,' whereas Act 189 imposes a purely personal liability upon the lessee or user.**
>
> "Property taxes almost invariably become a lien upon the property which is the subject of the tax and the property is the thing looked to for collection. The tax imposed by Act 189 becomes 'a debt due from the lessee or user' recoverable only in an action of assumpsit."

Nor do Appellants explain or meet the rulings of this Court in *Flint v. Stone Tracy Co.* 220 U.S. 107, 150, *Tradermen's National Bank of Oklahoma v. Tax Commissioner* 309 U.S. 560, 565 (and others cited on pp. 15-16 of our Petition for Rehearing) that;

> "The difference . . . is **not merely nominal,** but rests upon **substantial differences between** the mere **ownership of property** and the **doing of business** in a certain way."

Appellants cavalierly attempt to dispose of all of these propositions by stating that—

> **"For the purposes of state law these might be ad valorem personal property taxes as distinguished from privilege taxes.** However, this Court is not governed by how Michigan law treats them insofar as the constitutional immunity of the Government is concerned, if in their operation and effect they are applied in a similar or identical fashion and have the same effect under that doctrine as privilege taxes previously upheld by this Court (page 4). . . .
>
> Here, *Murray*, a private corporation was taxed and was subjected to and **personally responsible for payment of the taxes,** as provided in a permitted by the laws and decisions of Michigan. **The Government and its interests were fully protected.** The fundamental principle of immunity, which is the **protection and preservation of the Government's supremacy, still remains."** (p. 5)
>
> "The heart and substance of the opinion in this case is its restatement of the fundamental principle of implied constitutional immunity, namely, that whatsoever be its name, a non-discriminatory tax, if imposed directly **on a private person with no interference with the Government or its operations,** is constitutional. Conversely, it would be unconstitutional." (p. 6)

Appellants' argument is fundamentally fallacious and specious. If the tax in the Murray case is none other than "the 'old and widely used ad valorem general property tax' . . . laid on Government property in the hands of a private bailee" (Murray), then under the doctrine of *United States vs. Allegheny* 322 U.S. 174 and the conclusion of this Court in *United States of America and Borg-Warner vs. City of Detroit*, 355 U.S. 466 at p. 471, "the tax was simply and forthrightly imposed on the property itself not on the privilege of using or possessing it."

Contrary to the suggestion of the Appellants, the incidence of the ad valorem tax was upon the property of the United States in the possession of its bailee, Murray. This tax basically and fundamentally (in substance and form) was a tax upon property of the United States and this property, owned by the United States, was constitutionally immune from State taxation under the principles of federal constitutional law—and not merely State law as Appellants intimate.

The statement by Appellants that

> "Here Murray, a private corporation, was taxed and was subjected to and personally responsible for payment of the taxes . . . the Government and its interests were fully protected. The fundamental principle of immunity which is the protection and preservation of the Government's supremacy still remains (p. 5) . . . with no interference with the Government or its operations" (p. 6)

is in direct conflict with and completely ignores the express provisions of the Michigan Statute (M.S.A. 7. 13). The General Michigan Property Tax Law in question in the Murray case, specifically provides for the assessment of personal property at the place "in which the **owner resides"** (Mich. Stat. Ann., Sec. 7.13), **except where the owner is a nonresident in which event** the **assessment** is made **to the person in Michigan in possession** or control, **with a right of recovery against** the **owner, secured by** a **lien** on the property (6 Mich. Stat. Ann., Sec. 7.14, Par. Seventh).

The City of Detroit Charter has a provision substantially to the same effect. See Appendix E in our Brief before this Court.

This right of collection from the owner by the person in possession, with a security to him of a lien upon the assessed property until the collection has been effected, has been expressly recognized in *Detroit Shipbuilding Co. v. City of Detroit*, 228 Mich. 145, 148.

By what authority is Murray's statutory right to a first lien upon the Government-owned property here assessed denied to it? And, if not denied, then there will be a statutory lien under the law upon Government-owned property and a statutory right afforded to the person in possession to collect from the United States Government.

The ad valorem tax in Michigan makes the person in possession a mere collector of the tax levied upon the property and gives him the right to recover the amount so paid from the owner (who is primarily liable therefor) pending which recovery the possessor (Murray) is given a lien upon the property—in this case, a lien upon the property of the United States and a claim against the United States.

In privilege tax cases, the tax is solely against the person exercising the privilege and he has no right to recovery against the owner nor to subject the property to a lien. This distinction was specifically pointed out by Mr. Justice Black in the *Borg-Warner* case, in which he said at page 469:

> "The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. Any taxes due under the statute are the personal obligation of the private lessee or user. **The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid.** So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury."

Furthermore, the suggested distinction of the Appellants (on page 7 of their Reply) that while the completed tools owned by the Government might be immune under *Allegheny*, materials in process, title to which vested in the Government, should not enjoy the immunity is a distinction without a difference. In both instances the property is Government-owned and the immunity from State taxation thereupon attaches with equal force.

The suggestion (at page 11 of Appellants' Reply) that the Michigan statute dealing with assessment of property omitted from prior assessment rolls excludes assessment where title to the property has changed, further illustrates that the tax in substance is an ad valorem tax upon the property and not upon the person for the privilege of using or possessing the property. Otherwise there would be no significance with respect to whether or not title to the property had changed hands, since the incidence of a privilege tax is upon the person exercising the privilege and not upon property subsequently transferred.

The tax in *Murray* is undeniably and simply an "old and widely used ad valorem general property tax." It is a tax imposed upon property owned by the United States. Under *Allegheny* neither a State nor its subdivisions has the right to impose such a tax upon property of the United States in the possession of a bailee of the Government. If *Allegheny* is still the law, and this Court in both *Murray* and *Borg-Warner* states that it is, then we respectfully submit that the property of the United States at the Murray plant was constitutionally immune from such state taxation.

Respectfully submitted,

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May 13, 1958.